TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1926

No. [redacted] 239

SOUTHERN PACIFIC COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED DECEMBER 29, 1925

CERTIORARI GRANTED MARCH 1, 1926

(31,528)

(31,528)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 805

SOUTHERN PACIFIC COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1925

[fol. 1] **IN COURT OF CLAIMS OF THE UNITED STATES**

No. B-368

SOUTHERN PACIFIC COMPANY

vs.

THE UNITED STATES

I. MINUTE ENTRIES

On November 7, 1922, the plaintiff filed its original petition.

Subsequently, to wit, on April 5, 1924, on motion made therefor, the plaintiff filed its amended petition. Said amended petition is as follows:

AMENDED PETITION—Filed April 5, 1924

The Honorable Court of Claims:

The Southern Pacific Company, plaintiff, respectfully represents:

I

Claimant is a corporation duly organized under the laws of the State of Kentucky, and as such corporation now is, and was during all the times hereinafter mentioned, engaged as a common carrier [fol. 2] in the transportation of passengers and freight in and through various States of the United States. Part of the lines operated by plaintiff were constructed with the aid of grants of land by the United States.

II

Under the Acts of Congress granting lands in aid of railroads and Acts of Congress regulating the expenditure of appropriations by the United States for Army transportation over such land-grant railroads, so far as same may be applicable, said land-grant railroads were required to transport troops and munitions of war and property of the United States at not exceeding fifty per centum of the rates paid by private parties for the same kind of service; but in none of said Acts were said land-grant railroads required, nor have they ever agreed, to transport at such reduced rates any property other than property of the United States.

III

At and prior to the times when the services hereinafter mentioned were performed, the railroad companies of the United States generally, including claimant, had severally agreed with the Quartermaster-General of the United States Army (subject to certain exceptions not necessary here to be stated) to accept, for the transporta-

tion of property moved by the Quartermaster's Department, United States Army, and for which the United States Government was lawfully entitled to reduced rates over land-grant roads (i. e., property of the United States), the lowest net rates lawfully available as derived through deductions account of land-grant distance from a [fol. 3] lawful rate filed with the Interstate Commerce Commission applying from point of origin to destination at time of movement. Said agreements are known as "Land-Grant Equalization Agreements," and are set out in Circular No. 23, Quartermaster General's Office, 1911, dated November 15, 1911, and Circular No. 6, Office of the Chief, Quartermaster Corps, 1913, dated March 1, 1913, published by the Government.

IV

During the years 1916 and 1917, and within six years of the filing of the petition, plaintiff, either exclusively or in participation with other carriers of which it was the "last carrier," and at the request of the defendant, transported certain horses, wagons, tents and other impedimenta accompanying troops, some of which required special, expedited train service, under an understanding and agreement with the defendant that plaintiff, as last carrier, would be paid therefor at a certain rate, to wit, one and one-half times Class A rate, net cash (i. e., without land-grant deductions), minimum 30,000 lbs. to the car, Western Classification. But plaintiff says that in settling plaintiff's bills or vouchers for said transportation, the defendant, through its accounting and disbursing officers, against the protest and objection of plaintiff, refused to pay for said service at the rate agreed upon as aforesaid and claimed by plaintiff, and allowed and paid plaintiff for said transportation at a certain less rate (after making land-grant deductions), to wit, the Class B rate, Western Classification, applicable only to emigrant movables, moved by ordinary freight trains, and wholly inapplicable to the transportation involved herein.

Certain of said shipments moved by ordinary freight trains, and for such service plaintiff, as last carrier, presented its bills at the applicable tariff rates, with land-grant deductions, but the defendant's accounting and disbursing officers, against plaintiff's protest, allowed and paid plaintiff for this service also only at the aforesaid Emigrant Movables Rate.

[fol. 4] Annexed hereto and made a part hereof is a statement, marked "Plaintiff's Exhibit A," showing in detail the transactions referred to herein, the amounts due plaintiff for said service, the amounts allowed and paid plaintiff for such transportation, and the balances remaining due and unpaid therefor, which said balances aggregate the sum of $42,734.97, for which plaintiff brings this suit.

V

For the transportation furnished, the United States was entitled to the lowest rate open to the public for like transportation under simi-

lar conditions. The Emigrant Movables rate was not available to anyone for the character of transportation furnished the United States as above stated. There is no similarity between "emigrant movables" and camp equipage and other Army impedimenta and supplies; nor does the United States occupy the position of an emigrant or one entitled to the Emigrant Movables rate under the law and the rules governing such transportation.

VI

This case is similar in all substantial respects to the following cases in this Court involving the application of the Emigrant Movables rate to the transportation of camp equipage and other Army impedimenta and supplies accompanying troops, in each of which cases the Court gave judgment for the plaintiff:

No. 33,681, Atchison, Topeka & Santa Fe Ry. Co., decided December 1, 1919 (55 C. Cls. 525—no opinion).

No. 34,465, Benj. F. Bush, Receiver, etc., decided February
[fol. 5] 21, 1921.

No. 34,666, Maine Central R. R. Co., decided March 7, 1921.

No. 34,457, Atchison, Topeka & Santa Fe Ry. Co., decided March 14, 1921.

VII

All the shipments referred to herein were made upon what is known as the Government form of bill-of-lading (14 Comp. Dec. 969-971), which provided that said bills-of-lading, when accomplished, should be the evidence upon which payment would be made, and plaintiff presented the duly accomplished bills-of-lading covering the transportation involved in this case, to the accounting and disbursing officers of the defendant, along with its vouchers for such transportation.

VIII

Wherefore, plaintiff says there is now justly due and owing it by the United States the sum of $42,734.97, exclusive of all just credits and offsets, for which amount it prays judgment, no assignment or transfer of the aforesaid claims or any interest therein having been made.

Plaintiff has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against that Government, and believes the facts stated in this petition to be true.

Southern Pacific Company, Plaintiff, by Charles H. Bates, Its Attorney in Fact. Harr & Bates, Attorneys for Plaintiff.

[fol. 6] *Duly sworn to by Charles H. Bates. Jurat omitted in printing.*

[fol. 7]

PLAINTIFF'S EXHIBIT A TO AMENDED PETITION

S. P. Co.

CT. OF CLAIMS

No. B-368

Statement of Amounts Disallowed from Southern Pacific Company's Bills for Transportation of Army Impedimenta, 1916-1917, on Account of Application by Government Accounting Officers of Emigrant Movables Rate, or Otherwise Due.

S. P. bill	Govt. B/L. No.	Govt. B/L. and date	From	To	Weight	Amount due	Amount paid	Balance claimed	War settlement No.	War settlement and date
44371	358	3-1-17	Nogales, Ariz.....	Sacramento, Cal...	60,000	$1,653.60	$415.29	$837.71	29275	8-30-17
43771	333	2-7-17	Nogales, Ariz.....	Calexico, Cal.....	420,000 (71,000)	7,375.00	1,757.23	5,617.77	29275	8-30-17
48597	49	8-27-17	Ames, Idaho.....	Deming, N. M.....	20,000	774.00	172.44	601.56	31035	4-4-18
45843	524	5-18-17	Nogales, Ariz.....	San Francisco, Cal.	980,000 (23 cars)	17,374.50	5,615.34	11,759.16	30241	1-31-18
47798	494	5-5-17	Nogales, Ariz.....	San Francisco, Cal.	150,000	2,632.50	807.99	1,824.51	30307	2-4-18
48076	211	7-31-17	Colfax, Cal.....	San Francisco, Cal.	30,000	50.36	46.00	4.36	30016	1-11-18
52649	63	11-17-16	Los Angeles, Cal...	Salinas, Cal.....	90,000	634.50	247.97	386.53	31713	5-13-18
47970	969	5-10-17	Douglas, Ariz.....	San Francisco, Cal.	528,700 (80,915) 17 cars	10,144.42	3,040.22	7,104.20	31104	4-8-18
42686½	102	11-9-16	Vancouver, Wis....	Calexico, Cal.....	58,040	159.31	83.51	75.80	28792	7-9-17
42725	252	12-21-16	Nogales, Ariz.....	Stockton, Cal.....	88,200	5,295.00	1,150.63	4,144.37	28565	6-4-17
43773	236A	12-23-16	Nogales, Ariz.....	Los Angeles, Cal...	90,000	1,441.50	421.12	1,020.38	29947	1-7-18
43772	249	12-20-16	Nogales, Ariz.....	Los Angeles, Cal...	330,000	5,287.50	1,517.68	3,769.82	28531	10-11-17
43774	236	12-13-16	Nogales, Ariz.....	Los Angeles, Cal...	270,000	4,324.50	1,316.76	3,017.74	28531	10-11-17
43823	33	10-19-17	Ft. Geo. Wright, Wn.	Yuma, Ariz.....	41,510	498.02	426.76	71.26	28975	7-28-17
48589	44	8-27-17	Mason City, Iowa..	Deming, N. M.....	11,147	774.00	163.96	610.04	31330	4-22-18
49183	266	9-8-17	Columbus, N. M...	Nogales, Ariz.....	146,260 and 2 cars Horses 11,147 actual	3,240.00	1,133.24	2,106.76	31423	4-29-18
					Total Amount Claimed.....			$42,734.97		

Special expedited train service was furnished with respect to all of the above shipments except those covered by Government bills of lading Nos. 211, 102 and 33, as to which three items regular tariff rates with land-grant deductions are claimed.

In a few instances, as indicated by the changes made in the above table, plaintiff's bills were, by mistake, presented for less amounts than those due at the rate applicable to the expedited service rendered and claimed in this amended petition.

[fol. 8] II. General Traverse

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendant, a general traverse is entered as provided by Rule 34.

III. Argument and Submission

On March 17, 1925, this case was argued and submitted on merits by Mr. William R. Harr, for the plaintiff, and by Mr. Heber H. Rice, for the defendant.

[fol. 9] IV. **Findings of Fact, Conclusion of Law, and Opinion of the Court by Graham, J.**—May 11, 1925

This case having been heard by the Court of Claims, the court upon the evidence makes the following

Findings of Fact

I

Plaintiff is a corporation duly organized under the laws of the State of Kentucky, and as such corporation now is and was during all the times hereinafter mentioned, engaged as a common carrier in the transportation of passengers and freight in and through various States of the United States. Part of the lines operated by plaintiff were constructed with the aid of grants of land by the United States.

II

Under acts of Congress granting lands in aid of railroads and acts of Congress regulating the expenditure of appropriations by the United States for Army transportation over such land-grant railroads, so far as same may be applicable, said land-grant railroads were required to transport troops and munitions of war and property of the United States at not exceeding fifty per centum of the rates paid by private parties for the same kind of service.

III

At and prior to the times when the services hereinafter mentioned were performed, the railroad companies of the United States generally, including plaintiff, had severally agreed with the Quartermaster General of the United States Army (subject to certain exceptions not necessary here to be stated) to accept, for the transportation of property of the United States moved by the Quartermaster's Department, United States Army, and for which the United

States Government was lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available as derived through deductions account of land-grant distance from a lawful rate filed [fol. 10] with the Interstate Commerce Commission applying from point of origin to destination at time of movement.

IV

During the years 1916 and 1917, and within six years of the filing of this suit, the War Department of the United States made a number of shipments of horses, wagons, tents, and other Army impedimenta by railroad, as more particularly set forth in the schedule marked "Plaintiff's Exhibit A," annexed to the petition herein, and made part hereof by reference, said shipments being made in connection with the movement of troops between like points.

Said shipments were all made upon the usual Government form of bill of lading prescribed by the Comptroller of the Treasury (14 Comp. Dec. 967, 969-971), calling for payment upon presentation by the last carrier of the accomplished bill of lading.

V

There is no proof that a shipping order preceding the bill of lading was given in any of the cases of transportation here involved. The bills of lading were prepared by the representatives of the defendant and presented to the representatives of the plaintiff for signature.

VI

The tariff in force on plaintiff's line at the time of the said movement, open to the public at large, was Western Classification No. 54, I. C. C. No. 12, and neither camp equipage, military impedimenta, nor company property was specifically embraced therein.

At the time of the transportation herein involved, plaintiff had on file with the Interstate Commerce Commission and in effect a duly published tariff, not required by law to be published, as follows:

"Item 378, Supplemental 9, Pacific Freight Tariff Bureau Exception Sheet No. 1-E agent F. W. Gomph's I. C. C. 252.

"Applies only on property of the United States Government moving under Government bills of lading.

"Military Impedimenta Equipment and Supplies.—On camp equipage and impedimenta, including livestock, carloads, minimum weight 30,000 pounds per car, either when accompanying troops or without troops, when handled by passenger train or expedited train service, the net cash rates will be assessed on basis of one and one-half times class A rates, without any deductions for land-aid or land-grant roads, in territory where tariffs providing class A rates are governed by Exceptions to Western Classification, Pacific Freight Tariff Bureau Exception Sheet No. 1-E (I. C. C. No. 252, I. C. C. No. 122 of F. W. Gomph, agent), supplements thereto and reissues thereof. Effective July 16, 1916, in Supplement No. 9."

There is no proof on the question of the reasonableness of this rate. For the transportation furnished the United States was entitled to the lowest rate open to the public for like transportation under similar conditions. There is no proof of any other than the above rate applicable to the shipments. Nor is there any proof that this rate was known to the defendant's representatives at the time [fol. 11] they were made, or that there was any express understanding or agreement between them and the representatives of the plaintiff that the shipments were to be made upon the basis of this tariff.

VII

Plaintiff's bills for the aforesaid transportation were duly presented to the defendant, which, through its accounting officers, refused to pay for said transportation at the aforesaid net cash rate claimed by plaintiff, and allowed and paid plaintiff for said transportation at a certain lesser rate, to wit, class B rate, Western Classification, applicable only to emigrant movables, moved by ordinary freight trains, with land-grant deductions.

VIII

All of the claims mentioned were stated on the form prescribed by the Comptroller, with certificate by the plaintiff that the amount claimed was correct and just, that the services had been rendered as stated, that payment therefor had not been received, and that the rates charged were not in excess of the lowest rates available for the Government based on tariffs effective at the date of service. All the claims were settled by certificate addressed to the Secretary of the Treasury by the Auditor for the War Department. These settlements were made during the period from June 4, 1917, up to and including April 29, 1918.

IX

In the case of the payment of each of said bills the plaintiff protested to the accounting officers against settling said bills on the basis of emigrant movables rate, and accepted payment under protest. The form of the protest in each case does not appear.

X

The facts as to each case of transportation here involved and the basis of settlement in each are as follows:

(a) Bill F 44371 B-1, WQ 358, March 1, 1917, covered a shipment of one car of impedimenta and one car of wagons and equipment. Plaintiff stated the account in the amount of $1,053, applying one and one-half times class A, minimum weight 30,000 pounds per car, without deduction for land grant, and which amount is correct on that basis. The Auditor for the War Department, denying that

this movement was covered by the exception sheet referred to (Finding VII), made payment in the sum of $415.29, based in part on classification by analogy to emigrant movables. Expedited service was requested and furnished.

(b) Bill F 43771 B/L WQ 333, February 7, 1917, covered a shipment of 14 cars, consisting of 8 cars of horses, 2 cars of company property, 1 car of forage, and 1 car baggage. Plaintiff stated the account in the amount of $7,375, applying one and one-half times class A, minimum weight 30,000 pounds per car, without deduction [fol. 12] for land grant as for passenger-train service. The correct amount on this basis is $6,844.50, plus $4.00 for sanding, making a total of $6,848.50. One car in this shipment was billed as a car of free baggage. Payment was made by the Auditor for the War Department on the 13 other cars in the amount of $1,757.23, based in part only on classification by analogy to emigrant movables. Expedited service was requested and furnished.

(c) Bill F 48597 B/L WQ 49, August 27, 1917, covered a shipment of one car of impedimenta. Plaintiff stated the account in the amount of $355.42. This movement was an ordinary freight movement, and the plaintiff now contends for the total gross charge of $744 on the basis of 30,000 pounds, minimum weight, at $2.58 per cwt., as per Transcontinental Freight Bureau Government Rate Circular 51-B, rule No. 5, effective August 1, 1917. Payment was made by the Auditor for the War Department in the sum of $172.44, based in part only on rating by analogy to emigrant movables. The difference between the amount originally claimed and the amount allowed by the auditor is $182.98, which amount is due the plaintiff. There is no proof of said circular 51-B, rule No. 5, or its provisions. Expedited service was not requested or furnished as to this shipment.

(d) Bill F 45843 B/L WQ 524, May 18, 1917, covered a movement of 11 cars of horses, 11 cars of wagons, 9 cars of company property, and 1 car of forage. Plaintiff stated the account in the amount of $17,374.50, applying one and one-half times class A, minimum weight 30,000 pounds per car, without land-grant deduction as for passenger-train service, which amount is correct on that basis. Payment was made by the Auditor for the War Department in the sum of $5,615.34, based in part only on rating by analogy to emigrant movables. Expedited service was requested and furnished as to this shipment.

(e) Bill F 47798 B/L WQ 494, May 5, 1917, covered a shipment of 4 cars of impedimenta and 1 car containing three horses. Plaintiff stated the account in the amount of $2,632.50, applying one and one-half times class A, minimum weight 30,000 pounds per car, without deduction for land grant as for passenger-train service, which amount is correct on that basis. Settlement was made by the Treasury Department in the sum of $807.99, based in part only on application by analogy to emigrant movables. Expedited service was requested and furnished as to this shipment.

(f) Bill F 48076 B/L WQ 211, July 31, 1917, covered a less-than-carload shipment of ordnance stores, tent poles, stores, small-arms ammunition, and trunks. Plaintiff stated the account in the amount of $50.36 on rates other than the one and one-half times class A rate. This movement was handled as an ordinary freight movement, and no expedited service claimed. Settlement was made by the Treasury Department in the sum of $46, based in part on rating by analogy to emigrant movables. There is admittedly due the plaintiff on this shipment $4.36.

(g) Bill F 52649 B/L WQ 63, November 17, 1916, covered a shipment of one car of escort wagons and two cars of horses. Plaintiff stated the account in the amount of $634.50, applying one and one-half times class A, minimum weight 30,000 pounds per car, without deduction for land-grant as for passenger-train service, which [fol. 13] amount is correct on that basis. Settlement by the Treasury Department was made in the sum of $247.97, based on tariff rates other than the one and one-half times class A or the emigrant movables rating. Expedited service was not requested or furnished as to this shipment.

(h) Bill F 47970 B/L WQ 909, May 10, 1917, covered a shipment of 2 cars of company property, 1 car of supplies, 1 car of horses, 6 cars of ambulances, 7 cars of auto trucks. Plaintiff stated the account in the amount of $10,144.42, applying one and one-half times class A, minimum weight 30,000 pounds per car, without deduction for land-grant as for passenger-train service, which amount is correct on that basis. Expedited service was not requested or furnished as to this shipment. Settlement was made by the Treasury Department in the sum of $3,040.22, based in part only on rating by analogy to emigrant movables.

(i) Bill F 42696½ B/L WQ 102, November 9, 1916, covered a shipment of one carload of trunk lockers boxed. Plaintiff erroneously stated the account in the amount of $138.91, based on 3rd class rates, there being no expedited service involved. Plaintiff now contends for the gross rate of $391.07, applying the 2nd class rating as per Western Classification No. 54, I. C. C. 12, by analogy to trunks, a net rate of $159.31. Settlement was made by the Treasury Department in the sum of $83.51, based on rating by analogy to emigrant movables rate. The difference between said net rate and the amount originally claimed is $75.80, which amount is due the plaintiff.

(j) Bill F 42725 B/L WQ 252, December 21, 1916, covered a shipment of 2 cars of wagons, 4 cars of guns, caissons, and limbers, 1 car of forage and company property, 1 car company property, and 2 cars of horses. Plaintiff stated the account in the amount of $1,347.58, based on a regular tariff rating other than one and one-half times class A. Plaintiff now contends for total gross charges, $5,265.00, based on rating of one and one-half times class A, minimum weight 30,000 pounds per car, without deduction for land grant. Settlement was made by the Treasury Department in the

sum of $1,150.63, based in part only on a rating by analogy to emigrant movables. The difference between the amount originally claimed and the amount paid in settlement is $196.95, which amount is due the plaintiff. No expedited service was requested or furnished.

(k) Bill F 43773 B L WQ 236A, December 23, 1947, covered a shipment of 2 cars of company property, and 1 car of forage. Plaintiff stated the account in the amount of $1,141.50, applying one and one-half times class A, minimum weight 30,000 pounds per car, without land-grant deduction as for passenger-train service, which amount is correct on that basis. Settlement was made by the Treasury Department in the sum of $421.12, based in part only on rating by analogy to emigrant movables. Expedited service was rendered as to this shipment. It does not appear that it was requested.

(l) Bill F 43772 B L WQ 249, December 20, 1946, covered a shipment of 2 cars of horses, 2 cars of company property, 1 car of forage, and 5 cars of guns, caissons, and limbers, 1 car of wagons. Plaintiff stated the account in the amount of $5,297.50, applying one and one-half times class A, minimum weight 30,000 pounds, without deduction for land-grant as for passenger-train service, which amount [fol. 14] is correct on that basis. Settlement was made by the Treasury Department in the sum of $1,517.68, based in part only upon analogy to emigrant movables. Expedited service was rendered as to this shipment. It does not appear that it was requested.

(m) Bill F 43774 B L WQ 236, December 13, 1946, covered a shipment of 4 cars of guns, caissons, and limbers, 3 cars of wagons, and 2 cars of horses. Plaintiff stated the account in the amount of $1,331.50, applying one and one-half times class A, minimum weight 30,000 pounds, without deduction for land-grant as for passenger-train service, which amount is correct on that basis. Settlement was made by the Treasury Department in the sum of $1,316.76, based in part only on rating analogous to emigrant movables rate. Expedited service was rendered in the case of this shipment. It does not appear that it was requested.

(n) Bill F 43823 B L WQ 33, October 19, 1917, covered a shipment of 1 car of clothing, trunk lockers, and barrack bags. Plaintiff stated the account in the amount of $498.02 based on 1st class rates, there being no expedited train service involved. Settlement was made by the Treasury Department in the sum of $126.76, based on application of emigrant movables rate. The auditor now contends that this movement should have the rating of class B, total charges amounting to $196.83. No expedited service was requested or furnished as to this shipment.

(o) Bill F 18599 B L WQ 14, August 27, 1917, covered a shipment of 1 car of impedimenta weighing 11,142 pounds. Plaintiff stated the account in the amount of $212.25 based on rating other than one and one-half times class A. Plaintiff now contends for gross charges of $771.00, based on 30,000 pounds minimum, as per

Transcontinental Freight Bureau Government Rate Circular 54-B, rule No. 5. Settlement was made by the Treasury Department in the amount of $163.96, based on rating by analogy to emigrant movables. As to this shipment expedited service was not requested or furnished. The difference between the amount originally claimed and the amount paid in settlement is $48.29, which amount is due the plaintiff.

(p) Bill F 19183 B/L WQ 266, September 8, 1917, covered a shipment of 6 cars of company property and 2 cars of horses and mules. Plaintiff stated the account in the amount of $3,240, applying one and one-half times class A, minimum weight 30,000 pounds, without deduction for land grant as for passenger train service, which amount is correct on that basis. Settlement was made by the Treasury Department in the sum of $1,133.24, based in part only on rating by analogy to emigrant movables. Expedited service was not requested or furnished in this case.

In all of the above cases the auditor held that the movements did not fall within the exception sheet referred to in Finding VII; that the rate claimed was erroneous for the reason that the property was not covered by Western Classification No. 54, I. C. C. 12, and that thus there was no specific rate for the property; and applied the emigrant movables rate by analogy as being the only one in his opinion applicable to the shipments.

[fol. 15] CONCLUSION OF LAW

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is entitled to recover the several amounts shown to be due it in Finding X, in the cases of bills of lading Nos. 44, 49, 102, 211, and 252, amounting in all to $498.38.

It is therefore adjudged — ordered that the plaintiff have judgment against the United States in the sum of four hundred and ninety-eight dollars and thirty-eight cents ($498.38).

OPINION

GRAHAM, Judge, delivered the opinion of the court:

This suit is brought to recover balances claimed by the plaintiff to be due on account of transportation charges on 16 different shipments of Government property, alleged to have been illegally deducted by the Auditor for the War Department from the plaintiff's bills as presented for payment. These shipments were made at different times between June 19, 1917, and May, 1918, and in most of the cases the points of origin and destination were different.

As to each of the 16 shipments the Auditor for the War Depart-

ment, on presentation of plaintiff's bills, held that the rate claimed therein did not apply to the shipment; that there were no published rates applicable to the character of goods shipped, and by analogy applied the emigrant movables rate in each case, the application of which rate was erroneous. The plaintiff protested at the time of payment in each case against the settlement on the basis of this rate. All the shipments moved on the form of bill of lading prescribed by the Comptroller of the Treasury for general use throughout the Government service, and each claim was stated on the form so prescribed, with a certificate by plaintiff that the account was correct and just, and that the service had been rendered as stated, that payment therefor had not been received, and that the rate charged was not in excess of the lowest rate available for the Government based on tariffs effective at the date of service.

So that at the outset we find that the payments made to the plaintiff were not the payments to which it was entitled; that is to say, the payments on the basis of emigrant movables rate were not proper, and we have left for consideration what, as shown by the findings, was a proper rate, under all the circumstances, to be charged by and paid to the plaintiff for the services rendered.

The plaintiff presented its bills, and is claiming recovery, on the basis of a special cash rate without land-grant deduction, and, as it appears from the findings that there is no proof of any other applicable rate, the plaintiff's recovery must be, if at all, on the basis of this special rate. Plaintiff claims that it was entitled to charge and be paid the rate named in its original bills by reason of a special contract with the Government for expedited and special service under a tariff, which it had published prior to the shipments, specially applicable to the transportation of the particular kind of goods shipped and the service rendered. The Government is entitled under the law to the lowest rate open to the public for transportation of similar property, less land-grant deductions. If the plaintiff had a [fol. 16] contract for a higher rate, it must establish its contract by proof as full and satisfactory as that required for the establishment of any other contract to hold the Government liable.

The case of Illinois Central Railroad Co. v. United States (58 C. Cls. 182), involved a shipment by ordinary passenger train of Government impediment. The plaintiff there had filed a special tariff rate for transporting of Government impedimenta on the basis of net cash. It based its recovery upon an implied contract growing out of the publication of the rate, upon the theory that the publication was constructive notice to the Government. There was no attempt to prove actual notice. The court held that a rate of this character applicable specially to the Government was not required by law and was not the legal rate referred to in the statute; that, not being a legal rate, it was in effect no rate at all; that the mere publication of such a rate was not constructive notice to the Government, and therefore there could be no recovery upon the implied contract growing out of such publication and the rendering of the service. In other words, it was held that the railroad could not, by merely

publishing such a rate, avoid the right of the Government to land-grant deductions.

In the present case, while the court has found that in some instances there was no expedited service requested or furnished, in others that there was expedited service but no request for it, and in still others that expedited service was requested and furnished, there is no proof in any instance of an express contract; that is, there is no proof of an understanding between the representatives of the Government and the representatives of the railroad that this special rate should apply to the shipments. The plaintiff bases its claim for recovery upon constructive notice to the Government of this rate and an implied contract to pay it. The rate is the same in principle and effect as that relied upon in the Illinois Central Railroad case, supra, except that in this case it was made to apply to special and expedited service. But this does not affect the legality of the proposition to hold the Government on an implied contract. The plaintiff in its brief states its position as follows:

"Clearly, when, with notice of this rate, the Government requested the plaintiff to transport military impedimenta, equipment, and supplies by special trains, a contract must be implied on the part of the Government to pay the rate specified in said tariff."

But there is no other notice shown of the rate than its mere publication, and under authority of the Illinois Central Railroad case, ante, plaintiff cannot recover on the basis of constructive notice by publication. Plaintiff cannot by the voluntary publication of a rate not required by law deprive the Government of its right to land-grant deductions where these deductions apply. The mere publication of a schedule of rates to be applicable to Government property does not prevent the application of land-grant deductions. Where the application of such schedule is sought and land-grant deductions are objected to, the carrier must show such a state of facts as will reasonably remove the shipment from the operation of the rule that land-grant deductions must be made. Where it relies upon a special contract it must establish it by proper and satisfactory proof. If it relies upon an implied contract it must prove all of the facts necessary to create an implication of contract, and the burden of this [fol. 17] proof is upon the carrier. The plaintiff has failed to establish the necessary contract, and cannot recover on the basis of the special rate claimed.

It is unnecessary to review the cases previously decided by this court where the carrier has been relieved of land-grant deductions. They were fully reviewed by the court in the Illinois Central Railroad case, supra, where the court said:

"It is manifest that each of the cited cases was decided upon the facts peculiarly applying to it, and without any attempt to lay down a principle applicable to all alike."

The plaintiff in this case bases its claim for recovery upon the rate fixed by tse special tariff, and has not proved or attempted to prove the applicability of any other rate. While the auditor was in error in settling the bills involved on the basis of the emigrant movables rate, as heretofore held in this court, and admitted in this case, there is not sufficient data to enable the court to determine either the proper classification for these shipments or the land-grant deductions. Certain sums shown by paragraphs (e), (f), (i), (j), and (o) of Finding X the plaintiff is entitled to recover. These were due to mistakes made in the settlement in each case, as shown in the finding mentioned, and in none of them is there involved any of the questions discussed and passed upon above. The aggregate of these sums is $498.38, for which judgment should be entered for the plaintiff, and it is so ordered.

Hay, Judge; Downey, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

[fol. 18] V. Judgment—May 11, 1925

At a Court of Claims held in the City of Washington on the Eleventh day of May, A. D., 1925, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the plaintiff, and do order and adjudge that the plaintiff, as aforesaid, is entitled to recover and shall have and recover of and from the United States the sum of Four hundred and ninety-eight dollars and thirty eight cents ($498.38).

By the Court.

VI. Proceedings After Judgment

On July 10, 1925, the plaintiff filed a motion for a new trial and for leave to file an amended petition.

On October 26, 1925, the court entered the following order on said motion:

Order

It is ordered by the Court this 26th day of October, 1925, that the plaintiff's motion for new trial be and the same is overruled.

By the Court.

[fol. 19] VII. Petition for Appeal—Filed October 28, 1925

Now comes the plaintiff, by its attorneys, and prays the court for the allowance of an appeal to the Supreme Court of the United States from the judgment of this court entered May 11, 1925.

On July 10, 1925, plaintiff filed a motion for a new trial in this case, which motion was overruled by the court on October 26, 1925.

William R. Harr, Charles H. Bates, Attorneys for Plaintiff.

VIII. Order Allowing Appeal

It is ordered by the Court this 2d day of November, 1925, that the plaintiff's application for appeal be and the same is allowed.

[fol. 20] Clerk's certificate to foregoing transcript of record omitted in printing.

[fol. 21] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation by Appellant of Parts of Record to be Printed, With Notice and Proof of Service—Filed November 16, 1925

Appellant intends to rely on the following points:

1. The Court of Claims erred in holding that the publication and filing with the Interstate Commerce Commission of the tariff specifying certain net cash rates for the transportation of military impedimenta, equipment and supplies for the United States by expedited train service (as set forth in finding of fact VI) did not constitute due and sufficient notice to the United States of said tariff, and that the United States was not bound by said tariff where such expedited service was rendered, upon request, express or implied, under the circumstances shown by the court's findings of fact, and in the absence of any claim or showing on the part of the Government that there was any rate or rates, open to the public, applicable to such special train service which, with due allowance to the United States for any land-grant distance involved, would be less than the net cash rates published and filed with the Interstate Commerce Commission as aforesaid.

2. The Court of Claims erred in holding that the reasonableness of the net cash rates, published and filed with the Interstate Commerce Commission as aforesaid, were open for determination in this [fols. 22 & 23] case, in view of such publication and filing.

3. The Court of Claims erred in not giving judgment for appellant for the difference between the amount paid appellant by the United States upon the basis of the emigrant movables rate (found by said court to be inapplicable) and the amount due appellant upon the basis of the aforesaid net cash rates, in each instance in which, according to its findings, expedited train service was rendered the Government.

The Clerk is requested to print the entire transcript of the Record in this case.

William R. Harr, Charles H. Bates, Attorneys for Appellant.

Copy of the foregoing Statement and Specification received this 13th day of November, 1925.

Wm. D. Mitchell, Solicitor General

[fol. 21] [File endorsement omitted.]

Endorsed on cover: File No. 31,528. Court of Claims. Term No. 805. Southern Pacific Company, appellant, vs. The United States. Filed November 7th, 1925. File No. 31,528.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1925

No. 805

SOUTHERN PACIFIC COMPANY, Appellant,

vs.

THE UNITED STATES

ORDER ALLOWING CERTIORARI

On consideration of the petition for a writ of certiorari in this cause,

It is now here ordered by the Court that the said petition be, and the same is hereby, granted.

And it is further ordered that this cause be, and the same is hereby, set for hearing on the Summary Docket on Monday, October 4th next, after the cases heretofore assigned for that day.

March 1, 1926.

(20)

Office Supreme Court,
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WM. R. STANSBU
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 239.

SOUTHERN PACIFIC COMPANY, *Petitioner,*

v.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR PETITIONER.

WILLIAM R. HARR,
CHARLES H. BATES,
Attorneys for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 239.

SOUTHERN PACIFIC COMPANY, *Petitioner*,

v.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR PETITIONER.

This case is before the court on a writ of certiorari to review the judgment of the Court of Claims therein entered May 11, 1925.

Petitioner also took an appeal, which was dismissed, on defendant's motion, per an opinion rendered March 1, 1926.

Statement of Case.

The facts as found by the Court of Claims (Rec. 5-11) are substantially as follows:

In 1916 and 1917 the War Department of the United States made a number of shipments of horses, wagons, tents, and other Army impedimenta, between certain points in California and other States "*said shipments being made in connection with the movement of troops between like points.*" (Finding IV, Rec. p. 6.)

The shipments were upon the usual Government form of bill of lading prescribed by the Comptroller of the Treasury (14 Comp. Dec. 967, 969, 971), calling for payment upon presentation by the last carrier of the accomplished bill of lading. (Ib.)

The shipments were all in carload lots, as appears from the details thereof given in Finding X, Rec., p. 7 *et seq.*

At the time of said shipments, plaintiff had on file with the Interstate Commerce Commission, and in effect, a "duly published tariff" reading as follows:

> "Item 378, Supplemental [Supplement] 9, Pacific Freight Tariff Bureau Exception Sheet No. 1-E agent F. W. Gomph's I. C. C. 252.
>
> "Applies only on property of the United States Government moving under Government bills of lading.
>
> "*Military impedimenta, equipment, and supplies.*—On camp equipage and impedimenta, including livestock, carloads, minimum weight 30,000 pounds per car, either when accompanying troops or without troops, when handled by passenger train or expedited train service, the net cash rates will be assessed on basis of one and one-half times class A rates, without any deductions for land-aid

or land-grant roads, in territory where tariffs providing class A rates are governed by Exceptions to Western Classification, Pacific Freight Tariff Bureau Exception Sheet No. 1-E (I. C. C. No. 252, I. C. C. [A. C. C.] No. 122 of F. W. Gomph, agent), supplements thereto and reissues thereof. *Effective July 16, 1916, in Supplement No. 9.*" (Finding VI, Rec. p. 6.)

The Court of Claims found that—

"The tariff in force on plaintiff's line at the time of the said movement, open to the public at large, was Western Classification No. 54, I. C. C. No. 12, and neither camp equipage, military impedimenta, nor company property was specifically embraced therein." (Ib., Rec. p. 6.)

Plaintiff rendered its bills for the aforesaid transportation upon the basis of 1½ Class A rates, net cash, as provided in said tariff, but the Government, through its accounting and disbursing officers, in settling plaintiff's bills, allowed and paid plaintiff on the basis of a certain lower rate applicable only to "emigrant movables" when moved by *ordinary* freight trains, with land-grant deductions, plaintiff accepting payment on that basis under protest. (Findings VII and IX, Rec., p. 7.)

The Court of Claims further found that all of plaintiff's "claims" were stated on the form prescribed by the Comptroller of the Treasury, with a certificate that the amount claimed was correct and just, that the services had been rendered as stated, that payment therefor had not been received, "*and that the rates charged were not in excess of the lowest rates available for the Government based on tariffs effective at the date of service.*" (Finding VIII, Rec., p. 7.)

As to a number of said shipments the Court of Claims found that expedited service had been requested and furnished, and also facts showing that the balances due for such expedited shipments, on the basis of the aforesaid net cash rates, provided by the above-quoted tariff, aggregated $19,312.65. (Finding X, Rec., pp. 7-8, paragraphs (a), (b), (d), and (e).).

The Court further found that expedited service was rendered in certain other instances, but that "it does not appear that it was requested." The balances due the Southern Pacific Company upon the latter shipments, on the basis of 1½ times Class A rates, net cash, aggregate $7,820.94. (Finding X, p. 10, paragraphs (k), (l) and (m).)

In respect of certain other items it was found that expedited service was not requested or furnished, as claimed. (Finding X, Rec., pp. 9-11, paragraphs (g), (h), (n), (o), and (p).

On certain items not involving any claim of expedited service, the court found certain amounts due plaintiff and gave judgment therefor in the sum of $498.38. (Finding X, Rec., pp. 8, 9, 11, paragraphs (c), (f), (i), (j), and (o).)

The court refused to give plaintiff judgment for the amounts found by it to be due plaintiff on the basis of said 1½ times Class A rates, net cash, minimum 30,000 lbs. per car, in the instances in which expedited service was found by it to have been furnished, or both requested and furnished, on the ground that the aforesaid tariff prescribing said "net cash" rates for ex-

pedited service for property of the United States moving under Government bills of lading was not a lawful tariff and did not bind the Government. (Opinion, Rec., pp. 11-14.)

POINTS RELIED ON.

1. The Court of Claims erred in holding that the publication and filing with the Interstate Commerce Commission of the tariff specifying certain net cash rates for the transportation of military impedimenta, equipment and supplies for the United States by expedited train service (as set forth in finding of fact VI) did not constitute due and sufficient notice to the United States of said tariff, and that the United States was not bound by said tariff where such expedited service was rendered, upon request, express or implied, under the circumstances shown by the court's findings of fact, and in the absence of any claim or showing on the part of the Government that there was any rate or rates, open to the public, applicable to such special train service which, with due allowance to the United States for any land-grant distance involved, would be less than the net cash rates published and filed with the Interstate Commerce Commission as aforesaid.

2. The Court of Claims erred in holding that the reasonableness of the net cash rates, published and filed with the Interstate Commerce Commission as aforesaid, were open for determination in this case, in view of such publication and filing.

3. The Court of Claims erred in not giving judgment for petitioner for the difference between the amount paid petitioner by the United States upon the basis of the emigrant movables rate (found by said court to be inapplicable) and the amount due petitioner upon

the basis of the aforesaid net cash rates, in each instance in which, according to its findings, expedited train service was rendered the Government.

ARGUMENT.

I.

Extent of Review Sought—Petitioner's Position.

Petitioner seeks a review of the judgment of the Court of Claims only insofar as concerns those shipments of Army impedimenta, in carload lots, made in connection with the movement of troops between the same points, as to which expedited service was furnished.

As above stated, with respect to four of the shipments, referred to in paragraphs (a), (b), (d), and (e) of Finding of Fact X—presenting differences between the amounts due plaintiff on the basis of 1½ Class A, net cash rates, and the amounts paid on the basis of the admittedly inapplicable Emigrant Movables rate, aggregating $19,312.65—the Court of Claims found that "expedited service was requested" as well as furnished. As to three other shipments, referred to in paragraphs (k), (l) and (m) of Finding X, showing like differences aggregating $7,820.94, the Court of Claims found that expedited service was furnished but that "it does not *appear* that it was requested." As to these latter shipments plaintiff's contention is that the circumstances attending the shipments, as disclosed by the findings, bring them within the tariff providing the net cash rates, and it is immaterial that it was not shown by the evidence that the expedited service rendered was expressly requested.

The position of the Court of Claims, as stated in

its opinion, is that even in those cases coming within Item 378 of Supplement 9 of Pacific Freight Tariff Bureau Exception Sheet No. 1-E, F. W. Gomph's I. C. C. No. 252, set forth in Finding of Fact VI, the Government is not bound to pay the net cash rates provided thereby because said tariff, although duly published and filed with the Interstate Commerce Commission, was not required by law to be so published and filed. In this case, we submit, the Court erred.

At the outset of its opinion the Court of Claims says that "the Government is entitled under the law to the lowest rate open to the public for transportation of similar property, less land-grant deductions," adding that "if the plaintiff had a contract for a *higher* rate, it must establish its contract by proof as full and satisfactory as that required for the establishment of any other contract to hold the Government liable."

The language of the Court of Claims just quoted shows a misunderstanding of plaintiff's position. Plaintiff is not in this proceeding claiming a *higher* rate for the transportation of the Army impedimenta referred to than would be open to the public. On the contrary, plaintiff recognized throughout this proceeding, and has always recognized, that the Government would be entitled to land-grant deductions from any rate open to the public found to be applicable to such transportation service. But the point is that, as the Court of Claims expressly found, there is no tariff open to the public applicable to the special and peculiar service here rendered. Thus the Court of Claims found that "the tariff in force on plaintiff's line at the time of the said movement, open to the public at large, was Western

Classification No. 54, I. C. C. No. 12, and neither camp equipage, military impedimenta, nor company property was specifically embraced therein." (Finding VI, first paragraph, p. 6.) And further on in the same finding, after setting out the tariff providing the net cash rates claimed for the movement of military impedimenta, equipment and supplies upon Government bills of lading, the Court states: "There is no proof of any other than the above rate applicable to the shipments." It also finds that the rate applied to such special train service by the Government accounting officers, to wit, the Emigrant Movables rate, "applicable only to emigrant movables, moved by ordinary freight trains," was inapplicable.

Furthermore, it has never been claimed in this case by counsel for the Government, or by any department, bureau or officer thereof, that there was any rate open to the public, in force at the time and applicable to the transportation of camp equipage, military impedimenta and supplies, including animals and vehicles, by special train, which, with land-grant deductions, would be less than the net cash rates provided by Item 378 of the aforesaid tariff. If there were any such tariff, plaintiff recognizes that the Government would be entitled to the benefit of it as a matter of course, and so stated in paragraph V of its petition. (Rec. pp. 2-3.)

The situation then is that the War Department made a number of shipments of horses, vehicles, tents and other Army impedimenta, in connection with the movements of troops between certain points, in carload lots, by passenger train or expedited service, and that it did so in the light of the fact that there was no tariff applicable to said service other than said Item 378

of F. W. Gomph's I. C. C. 252, the court finding that in several instances such special expedited service was expressly requested, and the circumstances disclosing that in the other instances with which we are concerned expedited service was impliedly requested, and that it is not shown or claimed that said net cash rates were unreasonable or unjust for the special service rendered, or that there were any other rates open to the public which, even by analogy, could be applied to such special movements and which, with land-grant deductions, would be less than the net cash rates specified in said tariff.

Is it fair, under these circumstances, to say that the Government is not bound to pay the net cash rates so provided for such special movements?

II.

History of Net Cash Rates as Applied to Movement of Military Impedimenta With Troops.

As far back as 1904 provision was made in the "Manual for the Quartermaster's Department, United States Army," published by authority of the Secretary of War, for the movement of troops with their impedimenta by special trains and for the payment of "net cash rates" therefor. Thus said Manual for 1904 provided (p. 179, italics ours):

> "694. For commands of four companies of foot troops, for one field battery, or for a troop of cavalry, *it is always better to arrange for special trains made up to include the freight cars carrying the command's freight. This insures the arrival together at destination of the troops and property of the command,* at the expense, however of passenger rates of speed, in order to comply with the

law regulating the speed of trains carrying freight cars.

"For the shipment of horses, when practicable, stock cars should be required that will admit of feeding and watering on the cars."

In Paragraph 696 of the same Manual (1904) a form of agreement for such special expedited service was provided, as follows (Italics ours):

"696. The following is a form of blank letter of agreement issued by the Quartermaster-General:

"This agreement, entered into this....day of ....., 190.., between ...., Quartermaster....., U. S. Army, and ....,

"Witnesseth: In consideration of the rates named below the.....Railroad agrees to transport.....officers and.....enlisted men (more or less) designated as.....from..... to....., together with the impedimenta authorized to accompany the command.

"The route of travel will be as follows:..... .....

"The train equipment will consist of..... coaches, ...standard sleepers,..... tourist cars, ... baggage cars, ... freight cars, all of standard quality and in good sanitary condition, passenger cars to be properly watered, lighted, and heated, and all equipment placed at point of embarkation in time for inspection before movement; *all cars to be run through from starting point to destination on as fast time as consistent with safety.*

"In consideration of the faithful performance of this agreement, the carriers shall be paid the following rates: Rail rate: Officers, per capita, ...; enlisted men, per capita, ... Sleeping-car rate: Officers, per berth, ...; enlisted men, per berth or section, ... Freight, per 100 pounds or carload, ...

"Bond-aided credit (if any): Officers, per capita, ...; enlisted men, per capita, ...; freight, per 100 pounds or carload, ...

"*The above rates are net cash and not subject to further deduction unless it is subsequently found that they are in excess of regular tariff rates less land-grant or other lawful deductions to which the Government is entitled, then the lower rate will govern in settlement.*

"It is understood and agreed between the carriers and the United States that 150 pounds of personal property per capita belonging to the officers and men will be carried free. Such free allowance to cover the personal baggage of the individual transported and not to include freight or property of Government or private ownership.

"Remarks: ....

"In witness whereof we hereunto affix our signatures.

....., Quartermaster, ...U. S. Army.

..... For the.....Railroad.

"N. B.—A certified copy of this agreement will in all cases be attached to the account as paid or prepared for payment."

Later on it was provided in the Quartermaster's Manual that bids need not be invited or formal agreement made for expedited service of the kind in question, and this was the situation in 1916 and 1917 when the transportation involved in this case was furnished. Thus, Volume I of the Manual for the Quartermaster Corps for 1916 (as corrected to December 15, 1917), under the head of "Transportation of Troops," provided (pp. 527-8, italics ours):

"3453. *In expedited movements bids need not be invited.* Preliminary advice should be furnished the carrier *orally, or by telephone or tele-*

graph, but in any event a letter of advice will be furnished the carrier.

"The following sample letter covers the general case:

"Office of the Quartermaster,
Fort....., ..., 1916.

"From: Quartermaster.

"To: (Superintendent or Agent), ... Railroad Company, ...

"Subject: Transportation.

"1. It is requested that the.....Railroad Company furnish transportation from..... to.....via.....for approximately the following:

.....officers.
.....enlisted men.
.....pounds of freight.
.....animals.
.....vehicles.

"Officers to be furnished one berth each in standard sleeper; the enlisted men to be accomodated three to a section in tourist sleeper.

"2. It is estimated that the following equipment will be required:

.....Pullman sleepers, ... sections each.
.....tourist sleepers, ...sections each.
.....baggage cars, with end doors.
.....kitchen cars.
.....box cars, ...feet long.
.....stock cars, ...feet long.
.....gondola cars.....feet long, with drop end.

* * * * * * * *

"3. It is desired to get the troops under way as soon as practicable, and *it is therefore requested that delivery of the equipment be expedited.* It is estimated that the first train section will be

ready to leave about..... o'clock, ... 19..., and will be followed as rapidly as possible by the other sections.

"4. It is understod that 150 pounds of personal checkable property per capita belonging to officers and men will be carried free.

* * * * * * * * * ,,

At first it was customary for the Southern Pacific Company and other carriers to quote net cash rates on the basis of Class A, Western Classification, minimum 30,000 lbs. per car for the movement of Army impedimenta by special trains with troops, and this was the practice down to October 1, 1914, when the rates for such impedimenta, including livestock, were increased by certain carriers, including the Southern Pacific Company, to 1½ Class A, net cash, same minimum.

That there were no tariff rates applicable to such special transportation services, which, with land-grant deductions, were less than the net cash rates specified in the earlier contracts (Class A, net cash, Western Classification, minimum 30,000 lbs.), as well as the fact that it was a great convenience to the War Department to be able to ship military impedimenta by special trains along with the troops to whom it belonged, without delaying to separate, pack, crate and itemize the various articles comprising such impedimenta, as otherwise would be required by the Classification Rules of the railroads concerned, was recognized by the Acting Secretary of War in a letter, dated August 5, 1913, to the Comptroller of the Treasury, quoted in 20 Comp. Dec. 120, 123, in which letter the Acting Secretary of War said, with reference to the net cash rates applied to such special movements of Army impedimenta under express contracts therefor (italics ours):

"2. As stated in your communication, *there are no published rates available to the general public that would be applicable on movements such as those referred to in these cases;* therefore the principal question would seem to be as to reasonableness of the rates claimed.

"3. *Camp equipment and impedimenta.*—For many years the War Department, in the movement of troops and their impedimenta in western territory, has entered into contracts providing for payment of class A rates on camp equipage and impedimenta. *This rating has been, and is considered just and reasonable* for the transportation of such camp equipage and impedimenta where it accompanies the troops and special train service is requested and furnished; *neither is it considered that such rate exceeds 50 per cent of such compensation as shall at the time be charged to and paid by private parties for like and similar transportation.*

"The only transportation at all analogous to that performed by the carriers in these cases is transportation by express, although that does not give the Government the same privileges as accrue under special train service. In the case of express shipments the property would not accompany the troops and would be out of the control of the military authorities from the time of departure until arrival at destination, *while in the case of special train service troops, property, and animals move in one train or various sections of one train, are practically under the control of the commanding officer at all times,* and, if a necessity arose, could be diverted intact to any point desired.

"Further, *there is no carload rating in the western classification applicable on camp equipage and impedimenta,* and the use of class A rating on these commodities *is an advantage to the Govern-*

ment, in that it allows the loading of all miscellaneous impedimenta accompanying troops in one or more cars at a carload rate, and the further fact that under such rating it is not necessary to itemize and weigh the various articles comprising the carload, an important item where time is an object.''

It is to be noted that this letter was written by the Acting Secretary of War in response to a direct inquiry by the Comptroller of the Treasury as to "whether his department in contracting for the service now under consideration" took into consideration the provisions of law with respect to land-grant deductions, and "whether the rates agreed to be paid for the service represent the net rates resulting from the application of a reasonable gross rate for the service less proper land-grant deduction, and whether the net rates as agreed upon are just and reasonable based on rates paid by private parties for like transportation as a gross rate with proper deduction therefrom."

As to animals and vehicles, accompanying these shipments, the Acting Secretary of War, in said letter, stated that "the conditions are believed to be different, and it is not thought by this office that the class A net rates are just and reasonable rates for commodities of this character moved in carloads, even though special train service is requested and furnished," and that "a just and reasonable rate compensation for the vehicles and live stock included in the shipments would be the freight tariff rate [applicable only to ordinary freight train service] with authorized land-grant deductions."

The Comptroller of the Treasury in said decision followed the advice of the Secretary of War and authorized payment to be made to the Southern Pacific

Company for the transportation there referred to on the basis of the Class A net cash rates contracted for, with respect to the camp equipment and impedimenta involved in said movements, and ordinary freight rates, with land-grant deductions, with respect to the animals and vehicles. The Company accepted payment under protest and brought suit in the Court of Claims for the balance due under the net cash rates contracted for with respect to the animals and vehicles as well. In giving it judgment for said balance, the Court of Claims said (*Southern Pacific Co. v. U. S.*, 53 C. Cls. 332, 338-339):

> "The defendants applied to the plaintiff company for rates covering a specially expedited service, a special train. The rates were furnished, the defendants accepted the terms and conditions of the special contract, and formally executed it through an officer authorized so to do. The plaintiff company performed the service and is entitled to be paid the contract rate therefor. *United States v. Andrews*, 207 U. S., 229; *Bush, Receiver, v. United States*, 52 C. Cls. 199.
>
> "The case of the *Southern Pacific Railroad Co. v. United States*, 237 U. S. 202, has, we think, no application to the issue involved herein. The statute quoted hereinbefore applied in terms to the above case. The transportation involved was an ordinary and usual through shipment upon an ordinary bill of lading. The company attempted to segregate the rate charges by an arbitrary application of local instead of through rates, thereby profiting by eliminating the mandatory reduction imposed by law upon the land-grant portion of its lines. In this case the situation is entirely devoid of similarity. The rate and service asked for was *special;* there was no public service akin

to it, the nearest approach being the rates applied for the carriage of excess baggage and express charges, both of which were higher. The making of the rate involved a computation based upon the special services exacted by the defendants, and it is expressly proven that in the final figures quoted land-grant deductions were fully considered. The contract provided that the rates were net cash and subject to deduction only in the event they were in excess of the regular tariff rates for a similar service over land-grant roads or other lawful deductions. This provision of the agreement, supplementary to the statutes, can not apply here to reduce the rates provided in the contract, for, as above stated, the service requested and performed was special, and the defendants so recognized it by paying for a portion of the same the contract rates. There is no basis for its invocation. To hold otherwise would subject to departmental supervision every contract for transportation involving special service and would manifestly deter a company from furnishing it, irrespective of its imperative necessity."

So, in *Yazoo & Mississippi Valley Railroad Co. v. United States*, 54 C. Cls. 165, the Court of Claims held that the United States was liable, upon an implied contract, for certain net-cash rates published by the carrier, though not filed with the Interstate Commerce Commission, where the Quartermaster's Department of the Army requested "special expedited service" with knowledge of the fact that the carrier had published such rates for that peculiar service.

There, as here, the tariff referred to applied only to the transportation of camp equipage and impedimenta, "when handled by passenger train or expedited train service." Furthermore, it appeared in that

case that the Quartermaster General had some time previously objected to the particular rates named in said tariff. But the Court of Claims said (54 C. Cls. 168-169):

> "The court does not hold that a railroad company, by issuing or publishing a rate or filing a tariff, can nullify the land-grant laws. We have held, however, that where the Government contracts with reference to a particular service it is bound by its contract. *Bush, Rec'r, v. United States*, 52 C. Cls. 199. In the instant case the stipulated facts show that plaintiff had published the rates it would charge for the special and expedited service, which was subsequently ordered and rendered. The rates were not published to the public, and the particular service was not required by or applicable to the public. The Government thus had notice of the rates which plaintiff would charge, and it ordered and secured the services without stipulating for any other rates or objecting to the proposed rates. Manifestly the Government could not, and did not, expect that the special services contracted for and secured would be rendered at regular tariff rates. The bill of lading specified that the minimum weight to the car would be 30,000 pounds. We think the effect of the whole transaction was that the parties contracted with reference to said proposed rates."

We think it equally clear, here, that when the Quartermaster General's department requested the movement of the Army impedimenta referred to by special train in connection with the movement of troops, it must be presumed to have done so in the light of the tariff, published and filed with the Interstate Com-

merce Commission, governing such special and peculiar service.

The only difference between the latter case and this is that in this case the plaintiff company did not think it necessary to prove that the Quartermaster's Department had actual notice of the tariff here in question, but relied upon the publication and filing thereof with the Interstate Commerce Commission.

Being expressly authorized, by Section 22 of the Act to Regulate Commerce, to make "concessions" to the United States in respect to its charges for the transportation of property for the Government, it was eminently proper that, for the convenience of the Government as well as themselves, such special rates should be published and filed with the Commission.

While the railroads may not have been required to publish and file such a rate for the benefit of the Government alone, having done so, they should be held bound thereby. Had the shoe been on the other foot, and the railroads attempted to disregard such special tariff and apply other and higher commercial rates to such special movements notwithstanding the filing of such special rate, we may be sure that the Government would have contended that the railroads were bound by the special rate so published.

As above stated, and as the Southern Pacific Case in 53 C. Cls., shows, petitioner has always recognized that if there were any rates open to the public for the special class of service rendered which, with land-grant deductions, were lower than the net-cash rates published or contracted for, the Government could avail itself of such lower rates and land-grant deductions. This is what the accounting officers of the Government attempted to do when they applied the emigrant movables rate to the shipments involved in this case, with land-grant deductions, but which rates the

Court of Claims held were inapplicable to these special movements. No other applicable rates have been claimed, and it is admitted by defendant's counsel that there were none.* So that we have here a case where, confessedly, the United States has not only been rendered a special and peculiar service, for its benefit and convenience, upon its express request, but the net-cash rates claimed were duly published and filed with the Interstate Commerce Commission and were less than any other rates that possibly could have been applied to such special service, with due allowance for any land-grant distance involved.

III.

The Shipment of the Impedimenta with the Troops in Carload Lots, Without Packing or Identification, Precludes the Government from Claiming Less-than-Carload or Quantity Rates.

The Court of Claims found that Western Classification No. 54, I. C. C. No. 12, was the tariff in force on petitioner's line when the shipments here involved moved, and the rules of the carriers governing the packing and identification of articles shipped at less than carload or any quantity ratings are fully set forth in that tariff. (See Rules 7 and 8, *ib.*, pp. 5-10.) In order to avoid having to comply with such rules and also to get the benefit of having the animals, vehicles and other impedimenta transported with the troops to whom the same belonged, the impedimenta was shipped in carload lots, and expedited service expressly or impliedly requested.

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*Reference is here made to the following statements on page 3 of the brief for the United States in opposition to the petition for a writ of certiorari in this case (No. 805, Oct. Term, 1925), to wit:

> "In the transportation of freight, the Government is entitled to the lowest net rating available to the general public, less proper land-grant deductions. In the instant cause, however, there was no tariff available to the public at large covering the character of property shipped."

It will be noted that the accounting officers of the Government, in settling plaintiff's bills for the transportion here involved, sought to find some *carload* rating that they might apply thereto and that the only rating they could hit upon was the "Emigrant Movables" rating, which the court had theretofore held inapplicable and which decision has since been acquiesed in. As also stated by the court, there was no rating in Western Classification No. 54, open to the public, on "camp equipage, military impedimenta, nor company property," whether moving by ordinary freight or special trains. As the impedimenta in question had been shipped as carloads, in bulk, and by expedited service, there was therefore no applicable tariff except Item 378 of Pacific Freight Tariff Bureau Exception Sheet No. 1-E, I. C. C. No. 252.

It will be observed, moreover, that even if we disregard the fact of expedited service having been requested and rendered, there is no claim that under any provision or rule of Western Classification No. 54 the Government could have gotten lower ratings on the shipments here involved, which, with land-grant deductions, would have been less than the net cash rates specified in said tariff for giving such shipments expedited service.

The net cash rate in question was really published by the carriers as a special privilege to the Government, the Government being authorized to avail itself of that privilege or not, as it chose. Clearly, it chose to avail itself of such privilege in those instances in which it expressly requested such special service, and we think it also availed itself of such privilege in the other instances in which, without any express request (so far as the record shows), it shipped such military

impedimenta, in carload lots (without packing, crating, or itemizing), *along with the troops to whom it belonged,* as set forth in finding of fact IV, since the object thereof was to have the impedimenta to reach its destination with such troops, which could only be accomplished by giving it the expedited service referred to in said tariff. And as above shown, this was the contingency expressly provided for in the Manual for the Quartermaster's Department for 1916, Paragraph 3453, which authorized the request for expedited service to be made "orally, or by telephone or telegraph."

The Court of Claims seems to think it is the duty of the plaintiff to prove a negative, namely, that by no possibility could the Government have gotten any less rates than those specified in Item 378, of Gomph's I. C. C. 252, instead of requiring the Government to prove that some lower rates were applicable to the special service requested by it and furnished by the carrier.

Petitioner feels that it proved its case when it showed that the Government, either expressly or impliedly, requested the expedited service rendered in the light of the fact that petitioner had published a tariff covering such special service and filed it with the Interstate Commerce Commission, and that it was incumbent on the Government to show that some other less rates were applicable, and the circumstances required land-grant deductions to be made therefrom. This the Government has unquestionably failed to do.

IV.

As to the Requirements of the Railroad Land-Grant Acts.

Petitioner contends that while the Government is entitled to require of the land-grant railroads all freight and passenger service *open to the public*, at the published tariff rates, less land-grant deductions, the Government is not entitled, under existing law, to demand of such railroads a special and peculiar service not open to the public and require land-grant deductions to be made from the rate or charge stated by the railroad therefor; that if the Government request such special service, it is bound by the rates stated by the railroads therefor, in the absence of a showing that an analogous service is furnished the public at rates which, with land-grant deductions, would be less than the rates named for such special service.

This is in effect conceded by the defendant, because, so far, it has made no contention that the Government would be entitled to land-grant deductions from what would be reasonable compensation for the special service rendered. And, as above shown, the War Department, in the Manuals for the Quartermaster's Department published by it, recognized the applicability of net cash rates not shown to be in excess of any applicable tariff rates open to the public for like or similar service, with land-grant deductions.

The provisions in the Army Appropriation Acts for many years past have contained certain restrictions as to the amounts to be paid the land-grant railroads for Government transportation, but such provisions have always been to the effect that such rates shall not exceed fifty per centum of the rates charged to and

paid by private parties "*for like and similar transportation.*" (See for example Act of August 29, 1916, chap. 418, 39 Stat. 633-634.)

It appears from the findings of fact made by the court in this case, as well as from the statement in the brief for defendant above quoted, that the service here performed was special and peculiar, and not open to the public or covered by any of the published tariffs of the carrier. Furthermore, it is not shown, found, or contended that the net-cash rates claimed by plaintiff were in excess of any rates open to the public for like or similar service.

Petitioner contends, therefore, that when the Government requested the movements of the military impedimenta involved in this case, by passenger train or expedited train service, it must be presumed to have done so in the light of the tariff referred to in the findings of fact made by the court, which, it will be observed, was merely one item of a general tariff published by the Pacific Freight Tariff Bureau, as agent for petitioner, and filed with the Interstate Commerce Commission.

As above shown, the right of the War Department to contract for a special service of this kind upon the basis of a net cash rate, notwithstanding the restrictions in the Army Appropriation Acts above referred to as to the payment of land-grant railroads for Army transportation, has been frequently upheld by the Court of Claims. And as held by the Court of Claims in the Yazoo & Mississippi Valley Railroad case, *supra*, where the Government ships with notice of the fact that the carrier is claiming a net cash rate for such special and peculiar service, not open to the public, the Government is bound by such rates, and is not entitled to land-grant deductions therefrom.

V.

Illinois Central Railroad Co. v. United States, 58 C. Cls. 182, Distinguished.

The Court of Claims treated the present case as parallel to that of the *Illinois Central Railroad Company Case*, 58 C. Cls. 182. But according to the report of that case, the court had before it the legality of a net cash rate published by the carrier for the transportation of camp equipage and military impedimenta *by ordinary freight trains*, which it limited to the United States and made net cash for no apparent reason. If there were any special reasons justifying a net cash rate in that case, they are not apparent from the report of the case. We suspect that the real basis for the net cash rate referred to in that case was that it was considered *less* than the published less-than-carload or quantity rates, open to the public, for articles comprising camp equipage and military impedimenta even after due allowance to the Government for land-grant deductions, or if not, that the War Department regarded it as more convenient to ship such impedimenta in carload lots, at the Class A net cash rates offered by the tariff involved in that case, rather than to take the trouble to incur the delay of separating, packing and identifying the different articles comprising such impedimenta so as to take advantage of the rates open to the public, with land-grant deductions. However, we are dealing here with an entirely different case—one in which *special expedited* train service was expressly or impliedly requested.

VI.

Balances Due Petitioner on Basis of the Net Cash Rates Claimed.

In Finding X the Court of Claims found that expedited service was shown to have been requested by the War Department with respect to the shipments covered by Government bills of lading WQ 358, 333, 524 and 494, referred to in paragraphs (a), (b), (d) and (e) of said finding. An examination of these paragraphs shows that an aggregate of $19,312.65 is due petitioner on account of said shipments, if it is entitled to recover on the basis of the net cash rates provided by—Item 378 of the said Gomph tariff (I. C. C. 252), as follows:

S. P. Co. Bill No.	Gov't B/L No.	Amount due at 1½ A, Net Cash Rates	Amount Paid on Basis of Emigrant Movable Rate	Balance Due
F 44371	WQ 358	$1,053.00	$415.29	$637.71
F 43771	WQ 333	6,848.50	1,757.23	5,091.27
F 45843	WQ 524	17,374.50	5,615.34	11,759.16
F 47798	WQ 494	2,632.50	807.99	1,824.51
			Total balance due on these shipments.....	$19,312.65

The Court of Claims also found that expedited service was furnished, but that "it does not appear that it was requested," with respect to the shipments referred to in paragraphs (k), (l) and (m), of Finding of Fact X.

If petitioner is entitled to recover on these items, the differences between the amounts paid petitioner on the basis of the Emigrant Movables rate and the amounts due petitioner at 1½A, net cash, minimum 30,000 lbs., are as follows:

S. P. Co. Bill No.	Gov't B/L No.	Amount due at 1½ A, Net Cash Rates	Amount Paid on Basis of Emigrant Movables Rate	Balance Due
F 43773	WQ 236 A	$1,444.50	$421.12	$1,023.38
F 43772	WQ 249	5,297.50	1,517.68	3,779.82
F 43774	WQ 236	4,334.50	1,316.76	3,017.74
			Balance due petitioner on these shipments.....	$7,820.94

VII.

Petitioner is Entitled to Recover Either Under the Tariff in Question or on a Quantum Valebat.

It is manifest that in the instances in which expedited service was requested petitioner has not been compensated for such special service by the payments received by it (under protest) from the defendant on the basis of the tariff provided for emigrant movables by *ordinary* freight trains. If, therefore, petitioner is not entitled to recover the additional amounts due it on the basis of the net cash rates provided by its duly published tariff covering the transportation of military impedimenta for the Government by passenger train or expedited train service, it is clearly entitled to recover for the special service so rendered on a *quantum valebat*.

In this respect this case is similar to the cases arising under Section 3744 Revised Statutes, where contracts with certain Departments of the Government have been held void because not reduced to writing and signed by the contracting parties, but recovery has been allowed for the services performed under the alleged contract upon a *quantum valebat*. (*Clark v. United States*, 95 U. S. 539; *United States v. Andrews*, 207 U. S. 229, 243; *United States v. N. Y. & Porto Rico SS. Co.*, 239 U. S. 88, 92; *Crocker v. United States*, 240 U. S. 74, 81.)

And, in this connection, the value of the services performed by petitioner may well be taken to be the amount which would be derived from the application of the net cash rates referred to in the tariff in question, in the absence of any showing on the part of the Government that those rates were unjust or unreasonable. If,

however, this be not done, the case should at least be referred back to the Court of Claims for findings on the question of the value of the services rendered.

This was the course suggested by Mr. Justice McKenna and Mr. Justice Holmes in stating their dissent in *Crocker v. United States* (240 U. S. at p. 82), and we believe the majority would have adopted this course in that case if the contract there involved had not been tainted with fraud.

However, we do not think that the Court will be called upon to take the step suggested, as we believe the petitioner is entitled to recover for the special train service requested by the Government upon the basis of the net cash rates published and filed by it with the Interstate Commerce Commission, as aforesaid.

It will be observed that Section 6 of the Act to Regulate Commerce (the pertinent provisions of which are set forth in the appendix hereto) requires every common carrier subject to the provisions of the Act to file with the Commission and keep open to public inspection schedules "showing *all* the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established;" and that said schedules must also state, separately, among other things, "*all privileges* or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee." Said section further provides:

"Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. *The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.*"

The United States, as a shipper, is of course as much bound by the filing and publication of such rates, fares, and charges as a private person or corporation.

The fact that by Section 22 of the Act it is provided that "nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States," among other things, does not nullify the requirement of Section 6 that *all* rates, fares, charges, as well as *all privileges* or facilities, must be filed and posted as stated therein.

It would appear, therefore, that in filing and publishing the schedule referred to in this proceeding, —and which was intended to give the United States a special privilege, not open to the public, as said tariff expressly stated—petitioner was complying strictly with the terms of Section 6 of the Act to Regulate Commerce, and the United States, when it shipped military impedimenta in accordance with the terms of such schedule, must be held to be bound by the terms thereof, in the absence of any showing that it was entitled to some other rates open to the public for like or similar service which, with land-grant deductions, were less than the net cash rates provided by said schedule.

CONCLUSION.

The judgment of the Court of Claims should be reversed and the case remanded with directions to enter judgment for petitioner for the sums of $19,312.65 and $7,820.94, in addition to the amount of $498.38 stated in the original judgment, making a total of $27,631.97; or with directions to ascertain and allow petitioner the amounts due it upon a *quantum valebat*.

Respectfully submitted,

WILLIAM R. HARR,
CHARLES H. BATES,
Attorneys for Petitioner.

APPENDIX.

Section 6 of the Act to Regulate Commerce, as amended (24 Stat., 379; 25 Stat., 855; 34 Stat., 584; 41 Stat., 483), provides:

> SEC. 6. (1) That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.
>
> (2) Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through

a foreign country into the United States the through rate on which shall not have been made public, as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

* * * * * * * *

(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

(8) That in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given over all other traffic for the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic. And in time of peace shipments consigned to agents of the United States for its use shall be delivered by the carriers as promptly as possible and without regard to any embargo that may have been declared, and no such embargo shall apply to shipments so consigned.

* * * * * * * *

Section 22 of the Act to Regulate Commerce, as amended (24 Stat., 379; 25 Stat., 855; 42 Stat., 827) provides:

Sec. 22. (1) That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; * * *.

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A motion for new trial having been made and entertained, the judgment in this case was not "entered" within the meaning of section 14 of the act of February 13, 1925, until the filing of the order denying the motion for a new trial 3-16

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 805

SOUTHERN PACIFIC COMPANY, APPELLANT,

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

MOTION BY THE UNITED STATES TO DISMISS, AND BRIEF IN SUPPORT THEREOF

Comes now the Solicitor General on behalf of the United States and moves to dismiss the appeal in this case on the ground that the judgment below is reviewable in this Court not on appeal but by writ of certiorari.

STATEMENT

This suit was brought by the appellant in the Court of Claims to recover $42,734.97 alleged to be due for the transportation of certain military impedimenta and supplies. (R. 1–3.) A judgment was rendered on May 11, 1925, awarding appellant $498.38. (R. 14.) Dissatisfied with the amount awarded, appellant on July 10, 1925, filed a motion for a new trial. (R. 14.) This motion was enter-

tained by the court and was overruled on October 26, 1925. (R. 14.) Two days later appellant applied for an appeal to this Court. (R. 14, 15.) The appeal was allowed on November 2, 1925 (R. 15), and perfected by the filing of the record in this Court on November 7, 1925. Being uncertain, however, whether appeal was the proper method of review, appellant also filed in this Court on December 29, 1925, a petition for writ of certiorari, which bears the same docket number as the instant case. The Government has filed a brief in opposition to the petition.

On page 4 of the petition for writ of certiorari appellant states—

> A doubt has arisen as to whether an appeal will lie in this case, notwithstanding the fact that the judgment appealed from was entered prior to the taking effect of said amendment to the Judicial Code, approved February 13, 1925, the doubt being based upon the fact that, in view of the filing of the motion for a new trial, said judgment did not become final, for the purposes of appeal, until after said Act took effect.

The Act of February 13, 1925, c. 229, 43 Stat. 936, to which appellant refers, went into operation on May 13, 1925. (Sec. 14.) Among other momentous changes in Federal appellate practice, it (Sec. 13) abolished appeals to this Court from judgments of the Court of Claims by repealing Section 242 of the Judicial Code and substi-

tuted as the mode of review the discretionary writ of certiorari. (Sections 3 (b) and (c).) Section 14 of the Act, however, contained the following provision—

> nor shall it affect the right to a review, or the mode or time for exercising the same, *as respects any judgment or decree entered prior to the date when it takes effect.* (Italics ours.)

ARGUMENT

A motion for new trial having been made and entertained, the judgment in this case was not "entered" within the meaning of Section 14 of the Act of February 13, 1925, until the filing of the order denying the motion for a new trial.

Section 14 of the Act of February 13, 1925, provided that the Act should not affect " the right to a review, or the mode or time " of exercising that right as respects any judgment *entered* prior to the effective date of the Act. The judgment in this case was originally rendered and, we assume, entered May 11, 1925, two days before the effective date of the Act. The motion for new trial was denied October 26, 1925, after the effective date of the Act of February 13, 1925.

If under these conditions the judgment was " entered " May 11th, within the meaning of Section 14 of the Act of February 13, 1925, the mode of review is by appeal. If the judgment was not " entered " within the meaning of Section 14 until the entry of the order denying the motion for new

trial, the mode of review is by certiorari. (Sec. 3(b), Act of February 13, 1925.)

In a long series of cases, running from 1844 to 1919, this Court has held that where a motion for a new trial or a petition for rehearing has been presented seasonably and entertained by the court, the judgment or decree does not become final for the purposes of review until the motion or petition has been disposed of.

Brockett v. *Brockett*, 2 How. 238;

Railroad Company v. *Bradleys*, 7 Wall. 575, 578;

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Texas & Pacific Railway Co. v. *Murphy*, 111 U. S. 488;

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Citizens Bank v. *Opperman*, 249 U. S. 448.

That this rule applies to judgments and decrees of the Court of Claims is evident from the following quotation from Chief Justice White's opinion in the *Ellicott case* (223 U. S. 539):

> The general rule governing the subject of prosecuting error or taking appeals from final judgments or decrees is, we think, applicable to judgments or decrees of the Court of Claims, and that rule treats a judgment or decree properly entered in the cause as not final for the purposes of appeal until a motion for a new trial or a petition for rehearing, as the case may be, when entertained by the court, has been disposed of; and the time for appeal begins to run from the date of such disposition. *Kingman* v. *Western Manufacturing Company,* 170 U. S. 675, 680, 681. It is, we think, also manifest that the appeal was taken upon the hypothesis just stated that the judgment entered did not become a final judgment for purposes of appeal until the motion for a new trial had been disposed of. *Texas & Pacific Railway Company* v. *Murphy,* 111 U. S. 488.

No question is presented in this case as to the timeliness of the filing of the motion for new trial, or as to the entertainment thereof by the Court of Claims. Under rule 90 of that court, "motions for new trial [with an exception not here material] shall be filed within sixty days from the time the judgment of the court is announced." The judg-

ment in this case was announced May 11, 1925 (R. 14), and the motion for new trial was filed exactly sixty days thereafter, July 10, 1925. (R. 14.) That the motion was entertained by the court is shown by its order of October 26, 1925, overruling the motion. (R. 14.)

Of the cases listed on page 4, particular reference is made to *Kingman* v. *Western Manufacturing Co.*, 170 U. S. 675, not only because it appears to be the case now most often cited, but because it contains a review of many of the earlier decisions and also presents a clear exposition of the underlying reasons for the above rule.

In that case a verdict was rendered in a United States Circuit Court against Kingman & Company on June 4, 1895. On the coming in of the verdict the court, according to the practice obtaining in the State in which it was located, at once rendered judgment on the verdict. On June 6, 1895, at the same term of court, Kingman & Company filed a motion to vacate and set aside the judgment and for a new trial. The motion was heard by the court and on December 11, 1895, at a subsequent term, was overruled. On January 20, 1896, Kingman & Company filed a petition for a writ of error from the Circuit Court of Appeals, which was allowed on the same day. In that court a motion was made to dismiss the writ of error on the ground that it had not been sued out within six months after the entry of the judgment of the Circuit

Court, as required by Section 11 of the Circuit Court of Appeals Act of March 3, 1891, c 517, 26 Stat. 826, 829. This Section provided—

> That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provision of this act shall be taken or sued out except within six months after the *entry* of the order, judgment, or decree sought to be reviewed * * *. (Italics ours.)

The Circuit Court of Appeals granted the motion to dismiss, and the case was brought to this Court by writ of certiorari.

After pointing out that while Section 11 of the Circuit Court of Appeals Act referred in general terms to the order, judgment, or decree sought to be reviewed, "the meaning must be confined to *final* orders, judgments or decrees" (italics ours), Chief Justice Fuller stated the question for decision as follows (p. 677):

> The question is, then, whether the judgment of which Kingman & Company complained became *final for the purposes of a writ of error* six months before the writ was sued out. (Italics ours.)

In holding that the judgment of the Circuit Court did not become final for the purposes of review by the Circuit Court of Appeals until the motion for new trial was overruled and that the writ of error having been sued out within six months

thereafter, the Circuit Court of Appeals erred in ordering its dismissal, the Chief Justice said (p. 678):

> At common law motions for new trial were made before judgment, but under the statutes of many of the States judgment is entered at once on the return of the verdict, and the motion for new trial made afterwards.
>
> * * * * *
>
> The motion for new trial in this case was filed within three days after the return of the verdict, and seasonably within the rule of the state statute, or the common law rule, and, it is said, within the rule enforced by the United States courts in that district. No leave to file it was required, and as it was entertained by the court, argued by counsel without objection, and passed upon, it must be presumed that it was regularly and properly made. This being so, the case falls within the rule that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. *Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal.* (Cases cited.) (Italics ours.)

The reason for the rule is aptly stated in the following quotation from the Chief Justice's opinion (p. 680):

> The court below while such a motion is pending has not lost its jurisdiction over the case, and, having power to grant the motion, the judgment is not final for the purpose of taking out the writ.

Before leaving the *Kingman case,* attention should be called to the fact that Section 11 of the Circuit Court of Appeals Act of 1891 finds its counterpart in Section 8(c) of the Act of February 13, 1925, which section, in turn, bears close resemblance to Section 8(a) of the same Act. This last section fixes the time within which a review by this Court must be applied for, while Section 8(c) performs the same office as to the Circuit Courts of Appeals. Both sections, like Section 11 of the Circuit Court of Appeals Act, require that review must be sought within a specified time after the "*entry*" of the judgment or decree complained of. If the word "entry" as used in Section 11 of the Circuit Court of Appeals Act is susceptible of the construction that it relates only to the time when, through denial of a motion for new trial or a petition for rehearing, a judgment or decree has reached the status of reviewability, it must follow that the same word must be given the same interpretation when used in a similar manner in Section 8(a) and Section 8(c) of the Act of 1925. In fact, Mr. Justice McReynolds in *Citizens Bank* v. *Opperman,* 249 U. S. 448, so interpreted the word "entry" when used in a section of the Act of September 6, 1916, c. 448, Section 6, 39 Stat.

726, 727, which is practically identical in language with Section 8(a) of the Act of 1925. Such being true, a familiar rule of statutory construction requires that a like interpretation be given the word " entered " when used in Section 14 of the Act of 1925 in connection with a similar subject-matter. (*Logan* v. *United States,* 144 U. S. 263, 301.)

Finally, there have been reserved for discussion two decisions which, it is submitted, would afford ample warrant for the dismissal of this appeal even though no other authorities had been cited. These cases, *Andrews* v. *Virginian Ry. Co.,* 248 U. S. 272, and *Chicago G. W. R. R. Co.* v. *Basham,* 249 U. S. 164, were decided by this Court in 1919 and involve the construction of Section 7 of the Act of September 6, 1916, 39 Stat. 728. That section provided:

> That this Act shall take effect thirty days after its approval, but it shall not apply to nor affect any writ of error, appeal, or writ of certiorari theretofore duly applied for. The right of review under existing laws in respect of judgments and decrees *entered* before this Act takes effect shall remain unaffected for the period of six months thereafter, but at the end of that time such right shall cease. (Italics ours.)

It will be noted that this section was enacted to accomplish an object similar to that for which Section 14 of the Act of February 13, 1925, was designed and also that Congress in both statutes described the judgments and decrees which were to be

saved from the operation of the legislation as those judgments and decrees which had been " entered " prior to the date the statutes became effective.

In *Andrews* v. *Virginian Ry. Co.* a judgment was entered in favor of the railroad in the Circuit Court of Roanoke County on June 16, 1916. In accordance with Virginia law, a petition for a writ of error to review the judgment of the Circuit Court was presented to the Court of Appeals of Virginia, which denied it on November 13, 1916. Subsequently, on November 27, 1916, a petition for a writ of error from this Court was presented to the Circuit Court and allowed on the same day.

Between the date the judgment of the Circuit Court was rendered and the date the petition for a writ of error from the Court of Appeals of Virginia was denied, the Act of September 6, 1916, *supra,* became effective (October 6, 1916). This Act made the judgments of State courts in cases like the one under discussion reviewable in this Court on writ of certiorari instead of by writ of error, as formerly, but by Section 7 allowed the latter writ to be used where the judgment had been " entered" before the Act took effect.

The question for decision was whether the case was reviewable in this Court on writ of error or by writ of certiorari. This involved, of course, the determination of the further question whether the judgment in the case was " entered " before or after the Act of September 6, 1916, became effective.

In holding that the judgment was not "entered" until after the effective date of the Act of September 6, 1916, and was therefore reviewable on writ of certiorari and not on writ of error, Chief Justice White, passing *sua sponte* upon the question of jurisdiction, said (pp. 274-276):

> The question is, has this court power by writ of error to review the judgment below; or, in other words, is the authority of the court to review that judgment confined by the Act of September 6, 1916, c. 448, 39 Stat. 726, to the right to do so by certiorari in the mode and time provided by that act? Considering the subject only from the character of the controversy, it is indisputable that the case comes within the generic class as to which the power to review by writ of error was taken away by the Act of 1916 and the authority to certiorari substituted. It results that, unless the judgment in question comes under some limitation or exception provided by the statute to the general rule which it establishes, we have no jurisdiction.
>
> There is no room for such exception unless it results from the provision in the statute taking out of the reach of its terms judgments rendered before it became operative. The act was approved on September 6, 1916, and was made operative thirty days thereafter. In form, the judgment to which the writ of error was addressed was rendered on June 16, 1916, before the operation of the statute, and was therefore outside of

its provisions. But the question remains, Was the judgment a final judgment at the date named, or did it become so only by the exercise by the Court of Appeals of its power as manifested by its declining to take jurisdiction on November 13, 1916, after the passage of the act? Undoubtedly, before the action of the Court of Appeals, the judgment was not final and was susceptible of being reviewed and reversed by that court. Undoubtedly, also, until the Court of Appeals acted, the trial court was not the court of last resort of the State whose action could be here reviewed. The contention, therefore, that the judgment of the trial court was a final judgment susceptible of being here reviewed by writ of error must rest upon the impossible assumption that the finality of that judgment existed before the happening of the cause by which alone finality could be attributed to it.

It is true that under the law of Virginia, in a case like this the power of the Court of Appeals to review the judgment of the trial court was gracious or discretionary, and not imperative or obligatory; but the existence of the power, and not the considerations moving to its exercise, is the criterion by which to determine whether the judgment of the trial court was final at the time of its apparent date, or became so only from the date of the happening of the condition—the action of the Court of Appeals—which gave to that judgment its only possible character

> of finality for the purpose of review in this court. * * *
>
> From this it follows that the judgment to which the writ of error was addressed was in substance a judgment rendered after the going into effect of the Act of 1916, and was only reviewable by certiorari, as provided in that act. The writ of error, therefore, must be and it is dismissed for want of jurisdiction.

The same question was involved in *Chicago G. W. R. R. Co.* v. *Basham, supra.* In that case a judgment was entered in the Supreme Court of Iowa on November 26, 1915. A petition for rehearing was filed, which, after consideration, was overruled April 7, 1916. Thereafter a second petition for rehearing was filed, and, "having been fully considered," was overruled on December 18, 1916. A writ of error from this Court was thereupon allowed.

Meanwhile the Act of September 6, 1916, the provisions of which have been set out above, became effective on October 6, 1916.

Whether the case was reviewable in this Court on writ of error or by writ of certiorari depended, Mr. Justice Pitney said (249 U. S. 166), "upon whether the judgment sought to be reviewed was 'entered before this act takes effect' within the meaning of Section 7."

The Court held (p. 167) that as "the judgment of the Supreme Court of Iowa did not become a

'final judgment' until December 18, 1916," the date the second petition for rehearing was overruled, it was not "entered" before the Act of September 6, 1916, went into effect and the case was, therefore, reviewable in this Court not by writ of error but by writ of certiorari.

This discussion has followed a beaten path. Its purpose has been to emphasize the point that the word "entered" as used in statutes relating to the right to review, the time for exercising the right to review, and the mode of review, of judgments has unvaryingly been held to refer, in cases where motions for new trial have been entertained, to the date when the motion was denied rather than the date when the judgment was originally rendered.

The judgment in this case was originally entered for the purposes of appeal May 11, 1925. If no motion for new trial had been filed, an appeal under the old statute could have been taken at any time within ninety days after May 11, 1925. The motion for new trial, entertained by the court, had the effect however not merely of suspending the running of the time for appeal, but of taking away the finality of the judgment, and, relating back to the date of the judgment, converting it into a decree *nisi*. The fact that the time which elapsed between the date of the rendition of the judgment and the date of the filing of the motion, during which an appeal might have been taken, is not counted in computing the time allowed in which to take steps

to review the judgment, shows this to be the effect of the motion for new trial.

It is clear that the word " entered " as used in Section 14 of the Act of February 13, 1925, refers to the date of an order denying a motion for new trial in those cases where such a motion is seasonably made and is entertained.

While the United States has no particular reason to favor either construction of the Act, it is desirable that the point be settled so that double-barreled appeals and petitions for certiorari need not be continued. It is important that the question be rightly decided, as it affects litigants generally. A construction other than that here contended for would be inconsistent with the purpose of the Act of February 13, 1925, in that it would tend to prolong the evil which the Act was designed to abate.

In view of the foregoing authorities it is respectfully submitted that the appeal herein should be dismissed.

WILLIAM D. MITCHELL,
Solicitor General.

JANUARY, 1926.

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 805

SOUTHERN PACIFIC COMPANY

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION OF THE COURT BELOW

The opinion of the Court of Claims has not yet been officially reported, but it will be found at page 11 of the transcript of record.

JURISDICTION

The judgment of the Court of Claims was entered May 11, 1925. Motion for new trial was filed July 10, 1925, entertained by the court and overruled October 26, 1925. (R. 14.) Jurisdiction to issue the writ is conferred upon this Court by Section 3 (b) of the Act of February 13, 1925. (43 Stat. 936, c. 229.) This judgment was "entered" within the meaning of Section 14 of that Act, when

the motion for new trial was denied, and the proper mode of review is by certiorari, not by appeal. A motion to dismiss the appeal in this case has been filed.

STATEMENT

Petitioner transported certain freight for the Government in connection with the movement of troops, said freight consisting of Army impedimenta. Bills for the services were rendered on the basis of one and one-half times Class A rating, 30,000-pound minimum, net cash, i. e., without deduction for land aid.

Petitioner had published and filed a certain tariff *relating only to Government property* moving under Government bills of lading and contends that the existence of this special tariff and a shipment by the Government constituted a special contract for special rates and relieved the carrier of its obligation to transport at land-grant rates.

With three exceptions the cars of impedimenta moved in the passenger trains transporting the troops. The Petitioner contends that this constituted special service for which it is entitled to special compensation, computed on the basis of the rating prescribed by the aforesaid tariff.

Petitioner billed the Government on that basis, but its said bills were reduced in amounts and settlement was made, by analogy, at rates applicable to "emigrant movables." The warrants were accepted by Petitioner under protest.

ARGUMENT

In the transportation of freight, the Government is entitled to the lowest net rating available to the general public, less proper land-grant deductions. In the instant cause, however, there was no tariff available to the public at large covering the character of property shipped. The Petitioner having rendered the service was entitled to compensation and, in the absence of a specific tariff, the accounting officers were obliged to resort to analogy to find a suitable rating. That applying to "emigrant movables" was selected as being most closely analogous to the property transported, and the carrier was paid on that basis.

Petitioner seeks to avoid land-grant obligation by publishing and filing a "net cash" tariff applicable only to Government shipments

At the time the service involved herein was performed, there was on file with the Interstate Commerce Commission, and duly published, a tariff reading as follows (R. 6):

> Item 378, Supplemental (Supplement) 9, Pacific Freight Tariff Bureau Exception Sheet No. 1–E agent F. W. Gomph's I. C. C. 252.
>
> *Applies only on property of the United States Government moving under Government bills of lading.* (Italics supplied.)
>
> Military impedimenta, equipment, and supplies.—On camp equipage and impedimenta, including livestock, carloads, mini-

mum weight 30,000 pounds per car, either when accompanying troops or without troops, when handled by passenger train or expedited train service, the net cash rates will be assessed on basis of one and one-half times class A rates, without any deductions for land-aid or land-grant roads, in territory where tariffs providing class A rates are governed by Exceptions to Western Classification, Pacific Freight Tariff Bureau Exception Sheet No. 1–E (I. C. C. No. 252, I. C. C. (A. C. C.) No. 122 of F. W. Gomph, agent), supplements thereto and reissues thereof. Effective July 16, 1916, in Supplement No. 9.

It will be noted that this tariff *applies only on property of the United States moving under Government bills of lading.* Said tariff provides for a rating of one and one-half times class A, *net cash, without any deduction for land-aid or land-grant.* The question is, can a carrier defeat the right of the Government to land-grant deductions, or avoid its obligation to transport Government property at land-grant rates, simply by publishing a net cash tariff applicable to Government shipments only and filing the same with the Interstate Commerce Commission?

Ruling of the Court of Claims on this point

In deciding this point, the Court of Claims held that inasmuch as the Government was entitled by law to the lowest rate open to the public for the

transportation of similar property, less land-grant deductions, a special tariff applicable alone to Government shipments was not a legal rate and, therefore, was in effect no rate at all. (R. 12.) The court further held that—

> Plaintiff cannot by the voluntary publication of a rate not required by law deprive the Government of its right to land-grant deductions where these deductions apply. (R. 13.)

There is no attempt on the part of the Petitioner to show that the Government is not entitled to receive transportation services at land-grant rates, except in so far as it contends that the publication of the special tariff relieves it of its normal obligation in this particular instance. However, if the carriers throughout the country were empowered to thus relieve themselves in special instances, it is difficult to perceive why they could not absolutely divest themselves of the land-grant obligation generally—simply by publishing and filing a net-cash rate with the Interstate Commerce Commission.

The results, inimical to Government interests, which would attend a favorable view of Petitioner's contentions are manifest, and due deliberation on these considerations demonstrates the wisdom of the Court of Claims in holding such a net-cash rate illegal.

Discussion of Petitioner's contention on implied contract

The Petitioner represents to the Court that the services involved in this suit were rendered under an implied contract to pay the net-cash rate specified in the special Government tariff. It is the Petitioner's contention in this regard that the publication and filing of the tariff and a subsequent shipment of impedimenta by the Government, created an implied contract for the special rates prescribed in the tariff.

Ruling of the Court of Claims on this point

In ruling upon this phase of Petitioner's case, the Court of Claims, citing its decision in a similar case (*Illinois Central Railroad Co.* v. *United States,* 58 C. Cls. 182), held that—

> * * * there could be no recovery upon the implied contract growing out of such publication and the rendering of the service,

because—

> * * * the mere publication of such a rate was not constructive notice to the Government (R. 12).

The Court of Claims further held that there was—

> * * * no proof in any instance of an express contract; that is, there is no proof of an understanding between the representatives of the Government and the representatives of the railroad that this special rate should apply to the shipments. (R. 13.)

In concluding its discussion on this the Court of Claims said—

> Where it (Petitioner) relies upon a special contract it must establish it by proper and satisfactory proof. If it relies upon an implied contract it must prove all the facts necessary to create an implication of contract, and the burden of this proof is upon the carrier. The plaintiff has failed to establish the necessary contract, and cannot recover on the basis of the special rate claimed. (R. 13.)

The Petitioner does not contend for recovery upon an express contract, but relies solely upon an alleged contract by implication. As far as the Government was concerned in the transaction, as disclosed by the record, it merely shipped certain property, apparently in the same manner as it had theretofore. The other incidents to the alleged implied contract for special rates were completed by the Petitioner—the party now claiming special compensation thereunder. Petitioner published the "Government" tariff and filed it with the Interstate Commerce Commission, and there is no showing that it was even brought to the notice of the representative of the Government who made the shipment. Further, there is no evidence of any knowledge on the part of the shipping agent of the Goverment of the existence of the special tariff. A shipment by the United States with knowledge of the filing of the special tariff would

not give rise to an implied contract. To so hold would mean that the United States would be forced to refrain from shipments or be bound by the unauthorized special tariff. An implied contract arises only where there is an *intent* to be bound, implied from the facts. No reason exists here to imply an intent on the part of the United States to be bound by the tariff, from the mere act of shipment, with or without knowledge of its filing. Having failed to prove the necessary facts to establish an implied contract, the Petitioner is precluded from recovery thereon.

Findings of fact of the Court of Claims

In its Findings of Fact, which are not subject to review, the Court of Claims found (R. 7):

1. " For the transportation furnished the United States was entitled to the lowest rate open to the public for like transportation under similar conditions;

2. " There is no proof of any other than the above rate (1½ X Cl. 'A,' net cash) applicable to the shipments;

3. " Nor is there any proof that this rate (1½ X Cl. 'A,' net cash) was known to the defendant's representatives at the time they were made; or

4. " That there was any express understanding or agreement between them and the representatives of the plaintiff that the shipments were to be made upon the basis of this tariff."

Conclusions of law of the Court of Claims

1. "There is not sufficient data to enable the court to determine the proper classification for these shipments or the land-grant deductions." (R. 14.)

2. "The plaintiff * * * has not proved or attempted to prove the applicability of any other rate" (other than 1½ X Cl. "A," net cash). (R. 14.)

3. "There is no proof in any instance of an express contract; that is, there is no proof of an understanding between the representatives of the Government and the representatives of the railroad that this special rate should apply to the shipments." (R. 13.)

4. "But there is no other notice shown of the rate than its mere publication, and * * * plaintiff can not recover on the basis of constructive notice by publication." (R. 13.)

5. "Plaintiff can not by the voluntary publication of a rate not required by law deprive the Government of its right to land-grant deductions where these deductions apply. The mere publication of a schedule of rates to be applicable to Government property does not prevent the application of land-grant deductions." (R. 13.)

The special tariff relied upon by the Petitioner was invalid and inoperative. It may also be conceded for the purposes of argument that the published tariff, covering emigrant movables, was not applicable. In this view of the matter, this ship-

ment was made with no published tariff applicable. If it be conceded that the railroad was entitled to reasonable compensation, in the absence of a duly published applicable tariff, no recovery could be had without proof of the reasonable value of the services rendered. The invalid special tariff can furnish no competent evidence of reasonable value because it is a mere self-serving declaration by the railroad and, as found by the Court of Claims (R. 7), no proof was offered of the reasonableness of the rate prescribed by that tariff. The emigrant movables rate does not establish the reasonable value of the service. Consequently, there is no basis for fixing proper compensation, and the railroad must be content with the amount it was paid.

The quoted conclusions of law are fully supported by the Findings of Fact of the Court of Claims, which are conclusive in this Court. The Petitioner here was not prejudiced nor deprived of any rights by the determination of the Court of Claims. It presents no valid ground for the allowance of a writ of certiorari, and the petition should be denied.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

HERMAN J. GALLOWAY,
Assistant Attorney General.

JOSEPH H. SHEPPARD,
Special Assistant to the Attorney General.

JANUARY, 1926.

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 239

SOUTHERN PACIFIC COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF ON BEHALF OF THE UNITED STATES

OPINION

The opinion of the Court of Claims (R. 11) is reported in 60 Ct. Cls. 662.

JURISDICTION

This Court, by an order dated March 1, 1926, ordered that the petition for writ of certiorari in this cause be granted. (R. 17.) The judgment in this case was entered on May 11, 1925 (R. 14), and a motion for a new trial having been duly entertained was overruled on October 26, 1925 (R. 14). The petition for writ of certiorari was

filed in this Court on December 29, 1925, and jurisdiction to issue the writ is conferred upon this Court by Section 3(b) of the Act of February 13, 1925. (Chap. 229, 43 Stat. 936.)

STATEMENT

Petitioner is a railroad corporation and part of its lines were constructed with the aid of land grants by the United States. (R. 5.) Under the Acts of Congress granting such lands and Acts regulating the expenditure of appropriations, said land-grant railroads were required to transport troops, munitions of war, and property of the United States, at not exceeding 50% of the rates paid by private parties for the same kind of services. (R. 5.) Petitioner was also a party to the so-called Equalization Agreements with the Quartermaster General of the Army. (R. 5, 6.) During the years 1916 and 1917, petitioner transported several shipments of horses, wagons, tents, and other Army impedimenta by railroad for the United States, such shipments being upon the usual Government form of bill of lading. (R. 6.)

Upon five items of transportation covered by this suit (Item C, R. 8; Item F, R. 9; Item I, R. 9; Item J, R. 9; Item O, R. 10) the court below allowed an aggregate recovery in the sum of $498.38. (R. 11.) To such recovery the Government does not here object. Recovery was denied by the court upon all of the other items involved in this suit. Upon four of them expedited service was re-

quested and furnished. (Item A, R. 7, 8; Item B, R. 8; Item D, R. 8; Item E, R. 8. (Upon three of them expedited service was furnished, but it does not appear that it was requested. (Item K, R. 10; Item L, R. 10; Item M, R. 10.) As to four of them, expedited service was neither furnished nor requested. (Item G, R. 9; Item H, R. 9; Item N, R. 10; and Item P, R. 11.)

The tariff in force on petitioner's line at the time of the movements of this transportation open to the public at large was Western Classification No. 54, I. C. C. No. 12, and neither camp equipage, military impedimenta, nor company property was specifically embraced therein. (R. 6.) At the time of the transportation here involved, petitioner had on file with the Interstate Commerce Commission a duly published tariff "not required by law to be published" (R. 6), which tariff provided that upon military impedimenta, equipment, and supplies, either when accompanying troops or without troops, when handled by passenger train or expedited train service, the net cash rates will be assessed on a basis of 1½ times Class A rates, without any deductions for land-aided or land-grant roads (R. 6). The tariff specifically provided that it "applies only on property of the United States Government moving under Government bills of lading." (R. 6.)

There is no proof on the question of the reasonableness of this rate. For the transportation furnished the United States was

> entitled to the lowest rate open to the public for like transportation under similar conditions. There is no proof of any other than the above rate applicable to the shipments. Nor is there any proof that this rate was known to the defendant's (Government's) representatives at the time they were made, or that there was any express understanding or agreement between them and the representatives of the plaintiff (petitioner) that the shipments were to be made upon the basis of this tariff (R. 7.)

Petitioner rendered its bills upon all of the items in question upon the review by this Court upon the basis of this special tariff, which was at a charge of $1\frac{1}{2}$ times Class A rates, without any deductions for land grant. The accounting officers of the Government settled at a lower rate, to wit: Class B, Western Classification, applicable only to emigrant movables moved by ordinary freight trains with land-grant deductions. Petitioner protested against these deductions. (R. 7.)

The Court of Claims held that this special tariff was not a lawful tariff; that the emigrant movables rate applied by the Government was not a proper rate; that there was no contract between the Government and the carrier to pay the rate specified in the special tariff; that the petitioner would be entitled to a reasonable rate for the service rendered, but there was no proof as to what was a reasonable rate, or that the rate used in the special tariff

was reasonable, and that in the absence of such proof petitioner could not recover upon these items.

ARGUMENT

The petitioner in this case seeks a recovery upon the ground that having published and filed the special tariff applicable only to the transportation of Government property (regardless of whether the officers of the Government in fact had notice of the existence of such tariff) and that the Government having received expedited service (regardless of whether such service was requested or not), a contract arose upon the part of the Government to pay the petitioner the rate fixed in such tariff. The petitioner further contends that since it had published and filed with the Interstate Commerce Commission this special tariff and since there was no other tariff applicable to the transportation service of the kind rendered in this case, that unless the Government proved that there was some other tariff applicable or that the special tariff was unreasonable, the petitioner is entitled to recover the rates stated in such special tariff.

With neither of these propositions are we able to agree.

Railroad companies can recover for transportation services rendered for the Government upon the basis of one of three possible theories, namely:

1. Where there is a lawful tariff open to the public, governing the transportation service rendered, the railroad company can recover upon such

rate, less any and all proper land grant or other deductions.

2. Where there is an express contract covering the transportation services rendered, which contract was within the authority of the Government officers to make, the railroad company can recover the rate fixed in such contract.

3. Where there is neither a lawful tariff open to the public nor an express contract covering the service rendered, then the railroad company should recover the reasonable value of the service so rendered.

It is submitted that in this case the petitioner has not proven its case under any of the above theories and therefore can not recover.

The Court of Claims found that there was no tariff open to the public governing the transportation service furnished in this case. (R. 6, 7.) Therefore the petitioner has not proven a case in which there is a lawful tariff open to the public.

It can not be seriously contended from the findings of fact in this case that there was any express promise or agreement by a duly authorized officer of the United States to pay to the petitioner for the transportation service involved in this suit one and one-half times class A, net cash rate. Petitioner says that since it had filed this special tariff, specifying such rate for this service, and the Government had received this service, there was a contract implied to pay the rate specified in the special tariff. There is no provision of law requiring or

authorizing the filing of tariffs applicable only to Government transportation. The laws require the filing of all rates, etc., open to the public. The prime purpose of this requirement is to produce uniformity of rates, and to prevent discriminations. It is well settled that transportation companies may grant concessions to the United States, and that such concessions or discriminations will not be violations of Interstate Commerce Acts. It was not the purpose of such Acts to prevent concessions in favor of the Government. The filing and publishing of tariffs applicable only to Government transportation are clearly outside the purpose, spirit, intent, and words of the Interstate Commerce Acts. The filing of such a tariff does not make it a lawful rate. It is not such a tariff as the Interstate Commerce Commission would have authority to pass upon and revise, and there can be no purpose in filing the same. Can it be said in such situation that when filed and published it becomes a lawful rate?

There is another question the consideration of which shows the invalidity of this special tariff. The findings in this case show that part of the lines of the petitioner are land-grant roads. (R. 5.) The special tariff upon which petitioner relies states that the rates will be assessed "without any deductions for land-aid or land-grant roads." (R. 6.) The Court of Claims set out in its findings that under Acts of Congress granting lands in aid of railroads and Acts of Congress regulating the expenditure of appropriations by the United States

for Army transportation over such land-grant railroads, said land-grant railroads were required to transport troops and property of the United States at not exceeding fifty per cent of the rates paid by private parties. (R. 5.) This situation is the result of positive statutory enactment, and the acceptance by the railroads of the land grants contained in such statutes. The Act of July 27, 1866 (Chap. 278, 14 Stat. 292, Sec. 11, p. 297; Sec. 18, p. 299), granting land in aid of part of petitioner's lines, imposes the obligation upon petitioner to accept the rates fixed by Congress, and the Act of March 4, 1915 (Chap. 143, 38 Stat. 1062, 1076, 1077), together with the Act of August 29, 1916 (Chap. 418, 39 Stat. 619, 633, 634), being the Appropriation Acts for Army transportation for the years 1916 and 1917, the years in which the transportation involved in this case was rendered, specifically provide that the Government shall be entitled to such deductions of fifty per cent. If the petitioner should be allowed to file a special tariff, such as that relied upon in this case, providing that the rates therein specified should be without land-grant deductions, the entire structure of the Land Grant Acts and the intention of Congress with respect to such Acts, as well as with respect to the Appropriation Acts following the same, would be set aside and rendered of no effect. This can not be done and any attempt by petitioner to do so is illegal and void. The tariff relied upon is an illegal tariff and is of no effect whatsoever.

The mere filing of that which is neither required nor authorized by the law, and which is in itself unlawful, can not be considered notice to the Government or to anyone else of its existence. The Government, as an entity, much less the particular officers who tendered the Government property for transportation, are not charged constructively with notice of the filing or publication of such rate. The findings show (R. 7):

> Nor is there any proof that this rate was known to the defendant's (Government's) representatives at the time they (the shipments) were made, or that there was any express understanding or agreement between them and the representatives of the plaintiff (petitioner) that the shipments were to be made upon the basis of this tariff.

Therefore there is no knowledge, either constructive or actual, of the existence of this tariff or claim of petitioner which can be attributed to the United States. In the absence of such, there can be no implied agreement to pay such rate. Before an agreement will be implied there must be facts from which it can be presumed that there was an intent so to agree. It can not be presumed that there was an intent to agree to pay a specific rate of which a party did not know.

Even assuming, without conceding, that the Government did have knowledge of such rate and such special tariff, that fact alone is not sufficient to warrant the presumption that it intended to pay such rate. Moreover, as to part of the transportation